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War on the Common Law: The Struggle at the Center of Products Liability

Carl T. Bogus

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War on the Common Law: The Struggle at the Center of Products Liability

*Carl T. Bogus**

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* Visiting Professor, Rutgers University School of Law-Camden. I wish to thank Calvin W. Corman, Perry Dane, Roger J. Dennis, Jay M. Feinman, Cynthia J. Giles, M. Kristen Rand and Richard G. Singer for their helpful comments.

INTRODUCTION

A war is underway. Battles are being fought in courthouses and statehouses, universities and institutes, editorial offices and corporate boardrooms. The stakes are, quite literally, incalculable. They include money and lives—no one can count how much or how many—and even more, for the war will profoundly affect our fundamental beliefs about the role of courts and the common law in democratic society.

This is not a war that will capture the public imagination or command newspaper headlines. It is about products liability law. The combatants include, on one side, a substantial segment of the business community, which seeks to make it more difficult to win large awards against manufacturers and, on the other, consumer advocates and trial lawyer organizations which seek to protect the injured citizen's right to sue. The war is being fought both on academic and political fronts. Volleys of books, law review articles, and reports from institutes are fired back and forth, while lobbyists work the halls of Congress and statehouses from Sacramento to Boston, PAC funds in hand. The fronts often merge; partisan money is contributed to foundations that give grants to scholars, subsidize symposia, and endow university programs which promote a favored view.

The war cannot be understood without recalling how, in 1916, when Benjamin Cardozo launched an "assault upon the citadel of privity"¹ by handing down his famous opinion in *MacPherson v. Buick Motor Co.*,² the case in which a consumer—a man who was injured when a wooden wheel on his new Buick collapsed—was first permitted to sue a manufacturer with whom he had no direct contractual relationship.³ The citadel fell completely fifty years later, and the victors established a new field of law in which consumers were able to sue manufacturers who produced dangerous products.

The birth of products liability was not only a victory for consumers who now could hold corporations accountable for unsafe products; it was, equally important, a victory of the common law. After the New Deal, many believed that the problems of modern society could only be addressed systematically, through comprehensive programs devised by experts. The common law seemed anachronistic. The concept of a body of law growing organically, case-by-case, shaped by many hands, seemed quaint if not chaotic. The legislature, with standing committees and expert staffs who could study

1. This is Cardozo's own description. *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931).

2. 111 N.E. 1050 (N.Y. 1916).

3. *MacPherson* eliminated the privity defense only for products that could be classified as "a thing of danger," which Cardozo defined as a product that "is reasonably certain to place life and limb in peril when negligently made." *Id.* at 1053.

problems over time and in depth, appeared better able to grapple with issues of public policy. Moreover, the problems of modern society were so complex that the legislature increasingly established professional bureaucracies to deal with them. Even admirers of the common law struggled to find a place for it in "the age of statutes."⁴ The development of products liability—"a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system"⁵—showed that the common law need not be relegated to the museum, that it can still be a dynamic instrument of social policy.

Over its first two decades, products liability evolved from a system concerned only with manufacturing defects, *e.g.*, MacPherson's Buick⁶ into one concerned also with design defects, *e.g.*, the Ford Pinto, which was designed in a fashion that made the gas tank susceptible to exploding in minor collisions.⁷ With respect to automobiles, for example, courts increasingly have held that cars that are not crashworthy are unreasonably dangerous and subject to liability,⁸ and today cars are safer and automobile fatalities lower.⁹

4. *E.g.*, GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982) (arguing for a marginal place for the common law by granting courts the authority to overrule obsolete statutes). Calabresi wrote:

The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law. . . .

. . . .

. . . The slow, unsystematic, and organic quality of common law change made it clearly unsuitable to many legal demands of the welfare state.

Id. at 1, 5. See also William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

5. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985).

6. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). In fact, *MacPherson* demonstrates that no bright line separates manufacturing and design defects. At trial, expert witnesses battled over what kind of hickory should be used for wheel spokes, whether, for example, fast growing hickories had greater shock absorbing capacity. DAVID W. PECK, *DECISIONS AT LAW* 40-61 (1961). The case easily might be placed into the design defect category.

7. See *infra* notes 403-29 and accompanying text.

8. A car is crashworthy if it is affords occupants a reasonable measure of protection in an accident. At first, courts rejected the crashworthiness doctrine. *E.g.*, *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir. 1966). A crashworthiness claim was first accepted in *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968), and a trend in that direction took hold over the next decade. *E.g.*, *Turner v. General Motors Corp.*, 514 S.W. 497 (Tex. Civ. App. 1974). *Evans, supra*, was overturned in *Huff v. White Motor Co.*, 565 F.2d 104 (7th Cir. 1977).

Despite the growth of regulatory bureaucracies, it has often been products liability litigation that has exposed grave risks and forced from the market products that impose unacceptable risks to public health and safety, e.g., asbestos,¹⁰ Dalkon Shield,¹¹ and Bendectin.¹² Even some scholars who view the products liability system with less than unqualified enthusiasm acknowledge it to be the principal mechanism protecting the public from dangerous products.¹³

9. The motor vehicle fatality rate has fallen 40% since 1975. In an 1988 article, George Priest attributed the decline to increasing gasoline prices and the adoption of the 55 mph national speed limit. George L. Priest, *Products Liability Law and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICY* 184, 190-91 (Robert E. Litan & Clifford Winston eds., 1988). His argument, however, is under pressure from the fact that, since 1988, fatalities have continued to decline even though the number of miles driven have increased. Most significantly, during the period 1988-1991, the motor vehicle fatality rate fell 10.8% while the nonfatal accident rate modestly increased. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE U.S.* No. 1030 at 622 (113th ed. 1993). This phenomenon can only be accounted for by improvements in automobile crashworthiness or in emergency medical care. It is likely that both have been contributing factors; certainly automobile crashworthiness has improved. See generally *Cars are Getting Safer*, CONSUMER REP., April 1994, at 250. How much credit should be given to products liability, how much to the National Highway Traffic Safety Administration ("NHTSA"), how much to consumer demand and voluntary manufacturer conduct, and how much to an interplay among these forces is, of course, a difficult question. Part III, Section B of this Article takes up the relative roles of products liability law and administrative regulation.

10. See *infra* notes 157-210 and accompanying text.

11. See *infra* note 392.

12. Some readers will flinch at my including Bendectin in this list. Bendectin is often offered as an example of a product *improperly* driven off the market by products liability and cited to show that pharmaceuticals should not be subject to strict liability. The prevailing view among scientists today is that Bendectin is not teratogenic or, at worst, it is only mildly so. Yet the research which leads most scientists to exonerate Bendectin was only done in response to products liability litigation. Some earlier research, including an important study by Professor Kenneth Rothman of the Harvard School of Public Health published in the *American Journal of Epidemiology*, associated Bendectin with birth defects. Kenneth Rothman et al., *Exogenous Hormones and Other Drug Exposures of Children with Congenital Heart Disease*, 109 AM. J. EPIDEMIOLOGY 433 (1979). Because this was a drug that provided comfort rather than treating a disease, the serious doubts about its safety warranted its removal from the market. Moreover, Bendectin may be far from safe. While scientists have not found a statistically significant correlation between Bendectin and birth defects, they have found significant correlations with congenital heart defects, pyloric stenosis and oral clefts. See *infra* notes 449-53 and accompanying text.

13. George Priest, for example, has written, "No one conscious of the dwindling budget and meager accomplishments of the Consumer Product Safety Commission can

A counter-assault has been underway for years, however, and it is now striking at the center of products liability. The literature overflows with criticism, and anyone perusing the law reviews in recent years might well come away believing that the predominant view is that products liability has been a disaster.¹⁴ In fact, products liability law has been the victim of its own success. Products liability was a popular cause in mid-century, but by the end of the 1960s the citadel had fallen, the battle was won, and progressives turned to other matters. Conservatives filled the vacuum. It is, at least in the realm of ideas, more fun to attack than defend, and critics have flocked to the debate in greater numbers than defenders.

The counter-assault has been waged in the political front as well. In 1986, hundreds of the nation's largest manufacturers and insurance companies banded together to lobby state governments to enact "tort reform" legislation,¹⁵ and two years later they formed a separate entity to lobby at the federal level.¹⁶ Because of the symbiotic relationship between the business

pretend that the United States makes a serious effort to regulate product quality directly. Instead, our society relies on liability actions to police the manufacturing process." Priest, *supra* note 9, at 184.

14. Modern tort law generally has no major constituency, observes Gary T. Schwartz. Within the top twenty law schools, Schwartz counts only one scholar (Marshall Shapo) who supports the current regime. Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 694-97 (1992).

15. They named their lobby the American Tort Reform Association ("ATRA"). The term "tort reform" is a savvy choice; it has a progressive ring which helps to obscure the fact that it is being used by those with a regressive agenda. ATRA calls for a return to principles "based on manufacture fault." It advocates legislation creating defenses based upon "whether the product was misused or altered, whether the product met state-of-the-art design standards at the time of manufacture, whether it complied with government standards, and whether it had open and obvious danger or was unavoidably dangerous." ATRA, THE TORT REFORM AGENDA (unpaginated, undated literature).

ATRA's 500 members includes the nation's largest petrochemical firms and insurance companies. When I reviewed ATRA's membership list a few years ago, I noted the absence of tobacco, asbestos and firearm manufacturers and wondered whether this was a deliberate tactical choice. See Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1159 n.312 (1991). It is interesting to note that current members include Philip Morris Co. (tobacco), Keene Corporation (asbestos), Strum, Ruger and Co. (guns), and the Sporting Arms and Ammunition Manufacturers Ass'n. ATRA Membership (April 21, 1994).

16. This group, called the Product Liability Coordinating Committee ("PLCC"), is a coalition of business trade associations, including the Business Roundtable, the American Mining Congress, U.S. Chamber of Commerce and the National Federation of Independent Business. Its principal sponsor is the National Association of

community and the Republican Party,¹⁷ tort reform has been a popular Republican cause. Both of the last two national Republican Party platforms expressly attacked the products liability system,¹⁸ and Ronald Reagan,¹⁹ Dan Quayle,²⁰ and George Bush²¹ have all championed tort reform. Tort reform efforts have enjoyed considerable success. Forty-eight states have enacted some form of tort reform in recent years.²² Some states have abolished or

Manufacturers ("NAM"), and PLCC's financial and lobbying information are included in NAM's reports. The executive director of PLCC is William D. Fay, who was previously a legislative director for Senator James A. McClure, a conservative Republican from Idaho who is well-known as a champion of business interests. Prior to becoming executive director of PLCC, Fay also worked for the National Coal Association and the Clean Air Working Group, both business lobbies. Telephone Interview with William D. Fay (Mar. 19, 1993). For McClure's politics, see MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1988, at 325, 328-29 (1988).

17. See generally Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 *BUFF. L. REV.* 1, 20-25 (1993).

18. REPUBLICAN PLATFORM 9-10 (1988) ("We call for a reasonable State and federal product liability standard We propose to return the fault-based standard to the civil justice system. Jobs are being lost, useful and sometimes lifesaving products are being discontinued, and America's ability to compete is being adversely affected."); THE REPUBLICAN PLATFORM 1992, at 49 (1992) ("[W]e support a federal products liability law. The cost of product liability protection is a great expense to the American consumer and seriously impedes our international competitiveness.").

19. Irvin Molotsky, *Reagan Reiterates Support for Liability Suit Limits*, N.Y. TIMES, May 31, 1986, at 28. See also Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 676 n.138 (1990).

20. Sandra Torrey & Mark Stencel, *Bush, Quayle Find Voters Respond to Anti-Lawyer Theme*, PHILADELPHIA INQUIRER, Aug. 29, 1992, at A4. See also David Margolick, *Address by Quayle On Justice Proposals Irks Bar Assn.*, N.Y. TIMES, Aug. 14, 1991, at A1 (reporting Quayle's speech to the ABA in which he unveiled proposals, formally made by the President's Council on Competitiveness which Quayle chaired, that were ostensibly designed to reduce costs and delays in the federal courts); and Deborah R. Hensler, *Taking Aim at the American Legal System: The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244, 250 (1992) (concluding that the Council's proposals went "well beyond civil procedural reform" and reflected a political agenda "to change the current balance between individual plaintiffs and corporate defendants, in favor of the latter").

21. In his acceptance speech at the Republican National Convention, Bush ridiculed Clinton as the candidate supported by "by every trial lawyer who ever wore a tasseled loafer," and his normal stump speech included an attack on lawyers and a "crazy, out-of-control legal system." Aaron Epstein, *Several Misfires as the Bush Camp Aims at Lawyers*, PHILADELPHIA INQUIRER, Sept. 17, 1992, at A9.

22. The last holdouts are Delaware, District of Columbia and Pennsylvania. Arkansas' reform relates only to government liability, Massachusetts and Wisconsin's

limited joint and several liability,²³ some have eliminated or restricted punitive damages,²⁴ and some have provided that judgments are to be offset by payments from collateral sources such as medical insurance or worker's compensation.²⁵ So far, however, tort reform efforts—although vigorous—have failed at the federal level, where the consumer groups have been able to provide organized opposition.²⁶

As significant as they are, however, most of these reforms have not affected fundamental products liability doctrine. The legislative battles have been skirmishes at the periphery. But the main objective has not been ignored. While business lobbyists have been waging their campaigns in the

concern only malpractice cases, and Vermont's involves only dram shop actions. JAMES A. HENDERSON JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 859-60 (2d ed. 1992). See also ATRA, *TORT REFORM RECORD*, Dec. 31, 1992, at 2 (taking credit for reform in 42 states).

23. Thirty-three states have abolished joint and several liability in whole or in part so that a defendant cannot be responsible for more than his proportionate share of plaintiff's injury. ATRA, *TORT REFORM RECORD*, *supra* note 22, at 1.

24. Twenty-seven states have imposed some restrictions, most commonly by capping punitive awards or requiring that they be supported by "clear and convincing" evidence. The lowest caps are \$250,000 (Alabama) and \$350,000 (Virginia). Some states limit punitive awards to some multiple of compensatory damages while others allocate a portion of punitive awards to public purposes. New Hampshire prohibits punitive damages entirely. ATRA, *TORT REFORM RECORD*, *supra* note 22, at 17-21.

25. Twenty states have adopted provisions varying from mandatory offsets to allowing collateral benefits to be offered as evidence for consideration by the trier of fact. ATRA, *TORT REFORM RECORD*, *supra* note 22, at 12-14. Another popular subject of reform legislation has been frivolous lawsuits. Twenty-nine states have authorized courts to impose sanctions for frivolous lawsuits. Many of these provisions parallel Rule 11 of the Federal Rules of Civil Procedure and provide for sanctioning frivolous or bad faith conduct by either party, but some authorize sanctions for frivolous claims only—not for frivolous defenses. ATRA, *TORT REFORM RECORD*, *supra* note 22, at 24-27.

26. As of this writing, it is unclear whether Congress will enact the Common Sense Legal Reforms Act, H.R. 10, 104th Cong., 1st Sess. (1995), one of ten legislative proposals in the Republican Contract with America. See *CONTRACT WITH AMERICA* 11 (Ed Gillespie & Bob Schellhas eds., 1994). That Act would *inter alia* replace the American Rule with a loser-pays requirement in diversity actions, cap punitive damages at \$250,000, and insulate distributors and retailers from strict liability. The most recent prior federal tort reform bill, the Product Liability Fairness Act, S. 687, 103d Cong., 2d Sess. (1994), failed when an attempt to invoke cloture was defeated by a 57-41 vote (three votes short of the necessary 60 votes.) Jonathan D. Glater, *Bill to Limit Product Liability Awards Dies in Senate*, WASH. POST, June 30, 1994, at D13.

state capitols, conservative scholars have directed a relentless barrage of criticism on fundamental doctrine—and the battle is now over central theory.

This Article has three interrelated objectives. The first is to describe, in a new way, the division between two competing paradigms of products liability law, each of which is rooted in a particular belief system. The birth of products liability law in the 1960s represented a partial victory for one of these models. Yet no clear choice was made between the two. When it was written in 1964, section 402A of the *Restatement (Second) of Torts* attempted to accommodate both paradigms, thus perpetuating the struggle. This conflict lies deep at the center, however, and it is not well understood. This Article will attempt to show that contest between the two paradigms is the eye of the hurricane around which more visible issues swirl and rage.

The second objective of this Article is to show that the future of the common law is inextricably tied to the future of products liability. There was a time when the common law was vibrant and giants such as Oliver Wendell Holmes and Benjamin N. Cardozo melodiously sang its praises and confidently practiced its art. G. Edward White, however, marks Cardozo's ascension from the New York Court of Appeals to the Supreme Court in 1931 as the end "of traditional common law adjudication in America."²⁷ As already mentioned, this was partly the result of seismic shifts caused by the New Deal; more recently, the growing acceptance of majoritarianism and the rise of an imperial Congress have contributed as well. Yet one flower—products liability law—has bloomed in common law soil. Whether this flower flourishes or wilts, therefore, is no small consequence to how the common law will be perceived. It is not mere coincidence that the fate of the common law should depend on this particular flower, moreover. Each of the two paradigms is connected to different beliefs about the role of the common law in democratic society and, at its most fundamental level, that is what the debate between them is about.

The third objective of this Article is to tie the first two themes together by showing that the decisive battle of the war will inevitably be fought over the issue of generic liability. Generic liability, or product category liability as it is also called, involves products that remain unreasonably dangerous despite the best possible construction, design and warnings. Some argue that products liability should end at this point, that a manufacturer who has done everything feasible to make its product reasonably safe ought not be subject to strict liability. Others contend that a manufacturer has a duty not to put unreasonably dangerous products, *i.e.*, products that have a greater social cost than social benefit, into the stream of commerce, and that a manufacturer who cannot feasibly make his product reasonably safe can elect not to distribute his

27. G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* 283 (expanded ed. 1988).

product at all. To many, generic liability is a radical concept: it raises the specter of courts deciding which products may and may not be distributed, and they perceive it as a judicial usurpation of legislative authority. Even today most judges probably hold that view. Nevertheless, this Article will describe why courts are moving slowly yet inexorably toward accepting generic liability.

Part I of this Article deals with the two paradigms that lie at the center of the struggle. It will relate how, through something of a historical quirk, it happened that section 402A of the *Restatement (Second) of Torts* was written in a way that blurred the distinction between two competing views of products liability law. It will then describe the principal features of the two paradigms and critique the law-and-economics movement, which presents the principal intellectual challenge to the increasingly dominant paradigm. Part II of the Article is devoted to generic liability. It provides an overview of the issue, and to avoid the "relentless preoccupation with abstract theory"²⁸ which is so common in the discourse about products liability, it deals specifically with the litigation involving three important but controversial product categories: asbestos, cigarettes, and handguns. Part III discusses important jurisprudential questions raised by the debate, namely: What are the respective roles of the courts, the legislature, and administrative agencies?

I. THE STRUGGLE AT THE CENTER

A. Two Paradigms

The most fundamental question in product liability is: What is it about a product that calls for imposing strict liability? Section 402A of *Restatement (Second) of Torts* was drafted in a fashion that gives a compound and ambiguous answer to that question. It states that a product is subject to strict liability when it is in a "defective condition unreasonably dangerous to the user." There is no preposition between the phrases "defective condition" and "unreasonably dangerous," and no other words expressing a relationship between those two concepts.²⁹ It not clear whether a product must be defective *or* unreasonably dangerous, defective *and* unreasonably dangerous, or in a defective condition *that is* unreasonably dangerous to the user. Moreover, neither the phrase defective condition nor the phrase unreasonably dangerous is adequately defined.³⁰ This has created a Tower of Babel, in

28. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 212 (1980).

29. *RESTATEMENT (SECOND) OF TORTS* § 402A (1964).

30. Comment g, which has the heading "Defective condition," states the strict liability "applies only where the product is . . . in a condition not contemplated by the

which courts and scholars use the same words to mean different things. It is appropriate to begin with the story of how this came to pass.

In 1958, William L. Prosser, working as the Reporter for the project, produced his first draft of section 402A. This draft did not speak of defect; it applied strict liability to food "in a condition dangerous to the consumer."³¹ A subsequent draft presented to the Council two years later contained the same language.³² At this juncture, some members of the Council sought to narrow the scope of liability, and the phrase was changed to "defective condition unreasonably dangerous to the user or consumer."³³ When this language was presented to the membership of the American Law Institute in 1961, F. Reed Dickerson of the University of Indiana at Bloomington rose to his feet and addressed the Institute:

Mr. Chairman, may I make a small point? In this discussion of substantive issues I hesitate to bring up a mere question of draftsmanship, but I think this may have some significance. . . .

. . . .

. . . I had always thought that 'unreasonably dangerous' was simply the best possible test for what was legally defective. It seems to me . . . that everything we might want to cover here is subsumed under the words 'unreasonably dangerous.'

Now, the addition of the words 'defective condition'—it would seem to me that this involves unnecessary questions of meaning. For example, in addition to 'unreasonably dangerous,' what would a purchaser have to show in order to make out a defective product? I would think that if he showed that it was unreasonably dangerous, it would be per se legally defective, and it is only gilding the lily to add the word 'defective.' For these reasons I move that we strike the word 'defective' . . .³⁴

Prosser said that Dickerson's suggestion would restore Prosser's original language, and he went on to explain why the Council rejected it:

ultimate consumer, which will be unreasonably dangerous to him." This suggests that the phrase *unreasonably dangerous* is an adjective, but it raises other questions. Does "defective condition" mean "a condition not contemplated by the ultimate consumer" (and thus every unanticipated condition constitutes a defect), or is the condition not contemplated by the consumer a third requirement?

31. RESTATEMENT (SECOND) OF TORTS § 402A (Preliminary Draft No. 6, 1958).

32. *Id.* (Council Draft No. 8, 1960).

33. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 831 (1973). Wade points out that when the word "defective" was first added the section still only applied to foods, so that "defective" essentially meant unwholesome. When the section was later broadened to cover "any product," the issue as to whether the word "defective" should remain was not revisited. *Id.*

34. 38 A.L.I. PROC. 87 (1961).

The Council [raised] the question of a number of products which, even though not defective, are in fact dangerous to the consumer—whiskey, for example [laughter]; cigarettes, which cause lung cancer; various types of drugs which can be administered with safety up a point but may be dangerous if carried beyond that—and they raised the question of whether ‘unreasonably dangerous’ was sufficient to protect the defendant against possible liability in such cases. . . . Therefore, they suggested that there must be something wrong with the product itself, and hence the word ‘defective’ was put in

. . . .
. . . . Now, I was rather indifferent to that. I thought ‘unreasonably dangerous’ on the other hand, carried every meaning that was necessary, as Mr. Dickerson does; but I could see the point, so I accepted the change.³⁵

One can only look back with dismay at this fateful moment. Unfortunately, by the time Dickerson brought this matter up the ALI had spent more than two hours discussing the proposed comments to section 402A.³⁶ The ALI members were tired, and some may have been especially tired of hearing from Dickerson, who had previously objected at length to relatively minor matters.³⁷ There was little to alert members about the potential importance of the issue, especially since, perhaps from an exaggerated sense of politeness at his juncture, Dickerson began by saying he was raising a “small point” involving a “mere question of draftsmanship.” Moreover, Prosser’s reply gave the impression that the Council had previously considered and rejected the very language that Dickerson was suggesting, but that was not the case. Prosser’s original language applied strict liability to “dangerous”—not “unreasonably dangerous”—goods. There is a profound difference between the two phrases. For example, a drug that is necessary to treat a fatal disease but that presents the risk of serious side-effects might be considered dangerous but not unreasonably dangerous. William B. Lockhart of the University of Minnesota and Charles W. Joiner of the University of Michigan briefly endorsed Dickerson’s motion,³⁸ but the matter was quickly

35. *Id.* at 87-88.

36. Wade, *supra* note 33, at 830 n.24.

37. See Wade, *supra* note 33, at 830 n.24.

38. Joiner argued that the concepts of defectiveness and unreasonable danger were inextricably intertwined. He said:

I think in the case of iodine, for example, or other poisons, that there is not a defective product in the absence of descriptive material—the product may be defective or unreasonably dangerous simply because it doesn’t have a warning. The two go together, and it must be judged as a package. What may be dangerous without a warning or defective without a warning may be perfectly okay and not dangerous if there is a warning.

concluded in a voice vote. "The noes seem to me to have it," concluded the chair, and no one took him up on his invitation to have the votes counted.³⁹

The rest, as they say, is history. Section 402A became the single most influential provision ever promulgated by the ALI.⁴⁰ Many states adopted products liability with specific reference to section 402A, and that section has been cited in more than 3,000 judicial opinions.⁴¹ For nearly thirty years section 402A and products liability have been virtually synonymous.⁴²

Now, thirty years later, the ALI is replacing section 402A.⁴³ In October 1991, ALI announced it was commencing a project to write a new products liability chapter for the *Restatement (Third) of Torts*.⁴⁴ From the time that it empaneled a committee several months later, there was little doubt about the direction the final result would take.⁴⁵ The Reporters for the project were to be Professor James A. Henderson of Cornell Law School and Professor Aaron D. Twerski of Brooklyn Law School, who advocated that barricades be erected to block the continuing evolution of products liability

Wade, *supra* note 33, at 88-89. "It seems to me," he added moments later, "that the Reporter's case of whiskey is taken care of by the words 'unreasonably dangerous.'" *Id.* at 89. Dean Lockhart was afraid that manufacturers of unreasonably dangerous products would be able to escape liability by arguing that the product was not also defective. He put it this way:

Suppose . . . hair dye is allergic to most people, or . . . detergent is allergic to most people. It may be made exactly the way the manufacturer intended that it be made, and it seems to me that he is a position to claim that it is not defective as long as it is made the way he intended it be made.

Id.

39. Wade, *supra* note 33, at 89.

40. James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. L. REV. 1257, 1260 n.17 (1993).

41. *Id.*

42. *But cf.* George C. Pratt, *Introduction, Symposium: The Revision of Section 402A of the Restatement (Second) of Torts: Occasion for Reform of Product Liability Law?*, 10 Touro L. REV. 1, 3 (1993).

43. The latest draft of its new work as of this writing is: RESTATEMENT OF THE LAW TORTS: PRODUCTS LIABILITY (Tentative Draft No. 1, April 12, 1994) [hereinafter RESTATEMENT (THIRD) OF TORTS (TD No. 1)].

44. *Statement of the Council Re: Restatement of the Law Third, Torts: Products Liability*, A.L.I. REP., Oct. 1, 1991, at 1.

45. In addition to Henderson and Twerski, who as Reporters would be the most influential members of the project, the nine member committee included three members who devote much or all of their professional time to representing business enterprises: John W. Martin, Jr., general counsel of Ford Motor Co.; Sheila L. Birnbaum of Skadden, Arps, Slate, Meagher & Flom, New York City; and Victor E. Schwartz, of Crowell & Moring, Washington, D.C. See Henry J. Reske, *Experts Tackle Torts Restatement*, A.B.A. J., Aug. 1992, at 18.

law. "American products liability law has reached a point from which further meaningful development is not only socially undesirable but also institutionally unworkable," they had written.⁴⁶ Generally, they wished to place products liability within a defect-oriented framework, and specifically, they wished to bar courts from entering the realm of generic or product category liability.⁴⁷ Each of these choices would have profound consequences for the future of products liability law and the common law. To appreciate why that is the case, one must first understand the struggle between the two competing paradigms of products liability.

Most courts divide products liability actions into three separate categories.⁴⁸ The first is appropriately labelled *manufacturing defect*. In this category, the answer to the question—What is it about a product that calls for imposing strict liability?—is simple and straightforward: The product must have a defect. The plaintiff, of course, must show that the defect was the proximate cause of his injury, but all he needs to establish about the product itself is that it was defective. A defective product is one that has been mismanufactured in some fashion and is therefore different than the manufacturer itself intended, which is consistent with the normal concept of defectiveness.

Products that are manufactured exactly as intended but are unreasonably dangerous are placed into a second category. These products are not defective in the standard meaning of that term; they do not fail because of an irregularity or flaw.⁴⁹ Again, the plaintiff must also show proximate cause, in this case that she was injured as a result of the unreasonably dangerous nature of the product, but the only quality the product itself must have is that it be unreasonably dangerous. Unfortunately, however, this category is called *design defect*, even though the hazard may not be the result of either design

46. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1266 (1991).

47. *Id.*; James A. Henderson, Jr. & Aaron D. Twerski, *Stargazing: The Future of American Products Liability Law*, 66 N.Y.U. L. REV. 1332, 1334 (1991); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1521 (1992). See also James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

48. This approach was advocated even before § 402A was promulgated in 1965. See W. Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 859 (1963).

49. The primary definition of *defect* is "an irregularity in a surface or structure that spoils the appearance or causes weakness or failure: fault, flaw" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 591 (1966).

or defect. A third category, common called *warning defect*, is reserved for products with inadequate warnings or instructions.

A number of courts have resisted this compartmentalization.⁵⁰ They have found that the unreasonably dangerous test works perfectly well for all cases. As one court put it:

In an effort to assure that a supplier of chattels would not become an insurer, the authors of the Restatement described the characteristic which would justify the imposition of liability in terms of a 'defect.' However, this word is not limited to its usual meaning *i.e.*, a fault, flaw or blemish in its manufacture or fabrication. Rather, the critical factor under this formulation is whether the product is 'unreasonably dangerous.'⁵¹

The word "defect," therefore, is sometimes given its standard English definition and sometimes used as a term of art to mean "unreasonably dangerous." It is always problematic to make a common word a term of art with a meaning that is different from the standard definition; the word inevitably carries connotations from normal use. The dual use of "defect" has been particularly unfortunate in this instance, however, because it has blurred an important doctrinal, ideological and jurisprudential division. Indeed, it has contributed to a situation in which the most fundamental issue is one of the least recognized issues in this entire field of law. Consider the following hypothetical presented by Henderson and Twerski:

P, after eating a heavy lunch consisting of three servings of pasta accompanied by two bottles of beer, climbs the stairs to the second floor of his home to retrieve a book from his bedroom. Sleepily returning downstairs to answer the door, *P* trips on a roller skate left by his nine-year-old daughter, falls down the stairs, and crashes his head through the glass screen of the television in the living room. [If] proof of defect is no longer required for the imposition of liability, the only question is which product(s) caused the injury.⁵²

50. *E.g.*, *Ross v. Up-Right, Inc.*, 402 F.2d 943, 947 (5th Cir. 1968) (holding that "to speak in terms of 'defect' only causes confusion" and the sole standard "is whether the product is 'unreasonably dangerous'"); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-37 (Or. 1974) (holding that the "two standards are the same" and that a "dangerously defective article would be one which a reasonable person would not put into the stream of commerce"); *Seattle-First Nat'l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975) (holding that "liability is imposed under section 402A if a product is not reasonably safe").

51. *Azzarello v. Black Bros. Co.*, 391 A.2d 1020, 1024 (Pa. 1973).

52. Henderson & Twerski, *Closing the American Products Liability Frontier*, *supra* note 46, at 1280.

As previously noted, the fundamental issue in products liability is raised by the question: What is it about a product that calls for imposing strict liability? Henderson and Twerski answer that question with *defect*. Moreover, the above passage suggests the only alternative to making defect the linchpin of products liability is to have no linchpin at all. This argument sets up a straw man. There is no mainstream school of thought that advocates responding to the question,—What is it about a product that calls for imposing strict liability?—with the answer *nothing*. The central debate is not between those who seek to preserve some limits to strict liability and those who advocate that manufacturers be made absolute insurers for all injuries that are in any way associated with their products; it is between those who make *defect* and those who would make *unreasonably dangerous* the linchpin of strict liability. These are two coherent but very different visions about what products liability—and, indeed, the common law—should be about.

The defect-oriented model is premised on the idea that the purchaser did not get what he bargained for. The classic defect is an irregularity due to a miscarriage in the manufacturing process, but the concept of defect is not limited to imperfections in materials or construction or to physical flaws. It includes shortcomings that result in the product failing to perform as the purchaser had a right to expect. One analyzes a case within this framework by identifying the deficiency, determining how the consumer was affected by it, and asking whether the consumer was entitled to a product without such a deficiency. The focus is on the relationship between seller and consumer, and the analysis is based on contract principles. For convenience sake, this model will be called Abinger's Paradigm.⁵³

Things are quite different when the word "defect" is jettisoned and strict liability depends on whether a product is unreasonably dangerous. The concern is not so much whether the product had a flaw, irregularity, or other shortcoming that caused it to perform differently than the purchaser expected as it is with the consequences of the product. The focus is wider. It is not restricted to the bipolar relationship between seller and purchaser. A product may be unreasonably dangerous because it places others—nonpurchasers and even nonusers—at risk. The analysis encompasses all of the social benefits and costs which result from the product. This model will be called *Cardozo's Paradigm*.⁵⁴ Its motif is displayed in the often quoted formulation that Page Keeton set forth many years ago in the *Syracuse Law Review*:

53. The model is named after Lord Abinger, author of the opinion in the 1842 case of *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

54. This is named after Benjamin N. Cardozo, who wrote the decision in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916).

[A] product ought to be regarded as 'unreasonably dangerous' at the time of sale if a reasonable man with knowledge of the product's condition . . . would not now market the product Thus a product is improperly designed if its sale would be negligence on the part of a maker who had full knowledge of all the risks and dangers that were subsequently found to exist in the product, regardless of the excuse that the maker might have had for his ignorance of such dangers.⁵⁵

The particular doctrinal approach one favors is tied to what one considers the fundamental purpose of products liability law to be. Abinger's Paradigm is concerned with setting straight the original bargain between seller and purchaser, which after the injury must be accomplished by compensating the consumer for his loss. Those who subscribe to Abinger's Paradigm therefore emphasize the risk-spreading objective of products liability. They ask whether products liability is the best system for protecting the consumer. Are consumers not better off purchasing first party insurance? Would the fully informed consumer want the price of the product increased to provide him with insurance? Does forcing consumers to purchase this form of insurance affect their behavior, does it tend to make them less conscientious about protecting themselves?

Those who subscribe to Cardozo's Paradigm focus on societal rather than individual consequences. For them, products liability primarily serves as a deterrent to distributing unsafe products.⁵⁶ They sometimes speak in terms of cost-internalization, by which they mean that products liability forces those who benefit from a product (manufacturers and users) to bear the costs of the product, including the costs of injuries. If this drives the cost of the product up beyond the point where consumers will continue to buy it, then society is better off without the product because the costs of the product exceed its worth.⁵⁷ By contrast, the defect-oriented camp finds this result an abomination. They see it as a failed insurance system, where courts require consumers who want a particular product to buy an insurance premium they

55. W. Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969).

56. Prosser believed that while "[l]iability insurance is obviously not to be ignored . . . it is a makeweight, and not the heart and soul of the problem." William L. Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099, 1121-22 (1960). For him, the "public interest in human life, health and safety" was the primary justification for strict liability. *Id.* at 1122. See also Jerry Phillips, *The Proposed Products Liability Restatement: A Misguided Revision*, 10 TOURO L. REV. 151, 171-73 (1993).

57. See, e.g., Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CN. L. REV. 1183, 1185 (1992).

may neither need nor want and deprive them of the option of buying the product without insurance.⁵⁸

There is no better way to delineate the differences between these two paradigms than to describe and critique the law-and-economics movement, which is today the principal caretaker of Abinger's Paradigm.

B. Law-and-Economics

Few can argue with Dean Anthony T. Kronman of Yale Law School when he states that "the intellectual movement that has had the greatest influence on American academic law in the past quarter-century" is law-and-economics.⁵⁹ Legal economists⁶⁰ have taken a particular interest in products liability, and law-and-economics has become such an accepted part of discourse that it is impossible to participate in most conversations about products liability without being at least somewhat conversant with the language of law-and-economics. Indeed, all of the major products liability casebooks in use in law schools today contain excerpts from the writings of legal economists.⁶¹ Yet despite all of this—and well-funded efforts to promote it to the judiciary, as well as within the law schools⁶²—law-and-

58. See, e.g., James A. Henderson, Jr., *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 *TOURO L. REV.* 107, 116-18 (1993).

59. ANTHONY T. KRONMAN, *THE LOST LAWYER* 166 (1993). For readers who would like a short description of the law-and-economics, I recommend the section titled "Law and Economics" in Kronman's book, *id.* at 225-40, and Mark Tushnet, *Idols of the Right: The "Law-and-Economics" Movement*, *DISSENT*, Fall 1993, at 475.

60. In order to keep my discussion within reasonable parameters, I am forced to treat the entire law-and-economics as a cohesive whole although it has many parts. Kronman divides legal economists between those who argue "that one action is preferable to another if, all things considered, it produces greater welfare or well-being, economists providing the methods for measuring the effects of different actions in this regard" and those who "defend a strong view of their work's normative significance on libertarian rather than welfarist grounds." KRONMAN, *supra* note 59, at 234. My discussion is principally concerned with the libertarian school. The reader who wishes to explore differences among various scholars might consult Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 *MICH. L. REV.* 683 (1993).

61. I refer to the casebooks published by Foundation Press, Little, Brown & Co., West Publishing Co., and The Michie Company.

62. The John M. Olin Foundation has contributed more than \$13 million to support law-and-economics programs, including gifts of more than two million dollars to the University of Chicago, more than one million dollars each to Harvard, Yale, Stanford, and Virginia, and hundreds of thousands of dollars to half a dozen other elite law schools. Foundations associated with Richard Scaife have contributed about three

economics has not had a corresponding impact on the courts, and for reasons that will become clear, that is unlikely to change.

Legal economists evaluate products liability within the context of the buyer-seller relationship. For them, products liability rises or falls with whether it efficiently produces the result the parties desire.⁶³ Since sellers uniformly want to escape liability, the controlling question is whether the rational consumer—if fully informed about the risks of the product—would be willing to pay the cost of an the insurance premium incorporated into the price of the product.⁶⁴ Legal economists are "contractarians" who worship the sanctity of contract and have unbounded faith in the market.⁶⁵ For them, the only issue of importance is whether products liability is an efficient method of distributing risk as the parties themselves would desire. Seldom do they even acknowledge that products liability has another function—detering the production of dangerous goods.⁶⁶

million dollars of additional funds to support law-and-economics programs at these schools. ALLIANCE FOR JUSTICE, JUSTICE FOR SALE 29-37 (1993).

Since Henry G. Manne was appointed dean in 1986, the George Mason University School of Law has been entirely devoted to law-and-economics, and the school has received strong support from the Olin and Scaife foundations. The Law and Economics Center at George Mason University sponsors "economics seminars" for law professors and two-week "economics institutes" for federal judges. By 1991, 40% of all federal judges had attended at least one Center program. Nearly one-third of the Center's income comes from large corporations, including Exxon, General Motors, Pfizer and Mobil, and about two-thirds come from foundations such as Olin and Scaife. *Id.* at 34-35, 69-74.

Under the direction of George L. Priest, John M. Olin Professor of Law and Economics, the Yale Law School has held civil liability conferences for federal judges, which are funded by the Aetna Life and Casualty Foundation. Unlike the George Mason institutes, however, the Yale conferences apparently provide balanced views. *Id.* at 72, 74-78.

It may also be noted that the ALI's project to revise § 402A of the Restatement of Torts (Second) grew out of a five-year ALI study of the tort system that was, in large part, funded by the Aetna and RJR-Nabisco foundations. *Id.* at 51-52.

63. *Id.* at 477-78.

64. Croley & Hanson, *supra* note 60, at 713.

65. I take the term "contractarian" from Croley & Hanson, *supra* note 60, at 713. See also Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1184 (1990) (calling the same group of scholars "neocontractualists").

66. Even Judge Richard A. Posner, one of the few members of the law-and-economics school who defends contemporary doctrine, places greater emphasis on facilitating the transaction between seller and buyer than on public safety. While Posner appreciates that products liability increases the price of hazardous products and thereby leads consumers to substitute safer products, what really interests him is that

Indeed, legal economists exhibit a strange hostility to the notion that products liability was developed, in large part, to be a deterrence system. George L. Priest has gone to considerable lengths to try to demonstrate that the founders of products liability were interested only in risk distribution.⁶⁷ This is no easy task since Cardozo,⁶⁸ Traynor,⁶⁹ and Prosser⁷⁰ all argued that strict liability was necessary to safeguard public health and safety. Priest's creative but curious way around this is to contend that the real founders of products liability law were not Cardozo, Traynor, or Prosser at all,

products liability is an efficient mechanism for transmitting information (albeit encoded information) from manufacturers to consumers, and thus increases market efficiency. See *infra* note 93 and accompanying text.

67. Priest, *supra* note 5.

68. *MacPherson*, 111 N.E. at 1053 ("We have put aside the notion that the duty to safeguard life and limb . . . grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.").

69. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) ("It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.").

70. Prosser, *supra* note 56, at 1121-22 ("Liability insurance is obviously not to be ignored; but it is a makeweight, and not the heart and soul of the problem.") Priest argues that "Prosser's ideas and proposals were derived from those of James and Kessler," and that Prosser's credit merely "convinced the American Law Institute to accept and enact James's and Kessler's theory of enterprise liability." Priest, *supra* note 5, at 465.

but Fleming James⁷¹ and Friedreich Kessler⁷²—a view that can only be described as idiosyncratic.⁷³

Equally strange is Judge Richard A. Posner's attempt to impugn the reputation of Benjamin N. Cardozo. In 1990, Posner published a small volume that, as he describes it, was an effort to work out the "[m]ystery" of whether Cardozo's reputation is deserved.⁷⁴ "Today many legal thinkers believe that Cardozo has been greatly overrated—that his liberalism is a fake, his judicial philosophy a bunch of platitudes, his famous writing style obese[!] and archaic," explains Posner.⁷⁵ He cites no writings setting forth such views but assures us that some distinguished members of the legal academy privately refer to the late justice as "Carbozo."⁷⁶

One does not undertake a study in reputation of the likes of Benjamin Cardozo expecting merely to confirm the subject's reputation as well-deserved. Nothing would be more tedious. Posner shrinks from doing the full job,

71. Fleming James, one of the leading tort scholars in the 1940s and 1950s, is today best known as coauthor, along with Fowler Harper, of the three volume work, *THE LAW OF TORTS* (1956). Priest claims that James "promoted one principle—risk distribution—above all others," and says that James' views revolved around the single idea of "social insurance." Priest, *supra* note 5, at 470. Yet Fleming James may not have been as single-minded as Priest suggests. James clearly believed that products liability should protect not only the consumer but the public-at-large. Fleming James, Jr., *Products Liability*, 34 *TEX. L. REV.* 44, 55 (1955). "Surely an automobile manufacturer would be negligent in marketing cars without brakes, even if that fact were known to all the world," he wrote. *Id.* at 58. James expressly argued that strict liability was necessary to meet the increasing needs "for distributing and compensating losses and for promoting safety" in the modern world. *Id.* at 227 (emphasis added).

72. Kessler was a contracts scholar who began writing in the 1930's and ended his teaching career at Boalt Hall Law School in the late 1970's. Priest sees him as someone who constructed a foundation for enterprise liability out of contract principles. Few others, however, include Kessler among the founders of products liability.

73. David G. Owen represents the mainstream view when he says that while they may have helped to accelerate it, products liability would have come into being even if James and Kessler had never written a single word. David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 *J. LEGAL STUD.* 529, 531 (1985). Priest himself has partly recanted his argument that products liability was originally based on contract principles. George L. Priest, *Session Three: Discussion of Paper by George L. Priest*, 10 *CARDOZO L. REV.* 2329-30 (1989); George L. Priest, *Strict Products Liability: The Original Intent*, 10 *CARDOZO L. REV.* 2301 (1989).

74. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* vii (1990).

75. *Id.* at vii-viii.

76. More specifically, he attributes this term to his colleagues at the University of Chicago School of Law—home of the law-and-economics movement. *Id.* at 11-12.

however, and settles for damning Cardozo with faint praise. He pronounces Cardozo's analytical power weak compared to law professors, which happens to have been Posner's own calling before he descended to the bench, but notes that "we should not expect a high order either of intellectual creativity or of analytical rigor in even the best judicial opinions."⁷⁷ He suggests we ought to respect Cardozo's rhetorical skill as much as we would analytic power, just as we ought to value the role of distributors as highly as that of manufacturers.⁷⁸ Cardozo "deserves to be called a great judge," concludes Posner, even though he "was perhaps the least influential of the great judges in changing the direction of the law."⁷⁹

One might ask: Why bother to write a book about "the least influential" of the great judges? What is it that moves a legal economist like Posner to want to bring down Benjamin Cardozo?

Cardozo is famous for two things above all others: *MacPherson v. Buick Motor Co.*,⁸⁰ and a jurisprudence based on using common law as a dynamic instrument of public policy. It was in *MacPherson* that Cardozo cut the law of consumer sales from its moorings in the first paradigm, and, if one were to mark a point when what has termed Cardozo's Paradigm came into being, this would be it. *MacPherson*, moreover, was of a piece with Cardozo's general philosophy. Cardozo believed that the common law should promote the social welfare, which he thought of as "the good of the collective body."⁸¹ He saw the common law as continually growing to accommodate changes in knowledge, technology, and mores.⁸² He believed that judges, along with legislators, have a duty to make law.⁸³ He rejected the view that legislation was always a better tool of social policy.⁸⁴ In the traditional private law areas at least, he saw the incremental approach of the common law to be superior and equally authoritative. "Justice is not to be taken by storm," he wrote. "She is to be wooed by slow advances. Substitute statute for

77. *Id.* at 133.

78. *Id.* at 136.

79. *Id.*

80. 111 N.E. 1050 (N.Y. 1916). While several other Cardozo opinions may be equally famous, Posner himself declares *MacPherson* to be Cardozo's most influential decision. POSNER, *supra* note 74, at 33 n.1.

81. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 72 (1921).

82. Cardozo advocated relaxing the rule of adherence to precedent "when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare." *Id.* at 150. He believed the law should be interdisciplinary and change when new knowledge was acquired. See Benjamin N. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231 (1939).

83. CARDOZO, *supra* note 81, at 124, 136.

84. See CARDOZO, *supra* note 81, at 119.

decision, and you shift the center of authority, but add no quota of inspired wisdom."⁸⁵

Cardozo represents the antithesis of law-and-economics ideology. Cardozo sought to constrain business activity that was inimical to public welfare while the *raison d'être* of law-and economics is to facilitate market efficiency. Cardozo used tort law; legal economists would have contract law trump torts. Cardozo looked to sociology and psychology for explanations of human behavior; legal economists elevate economics over these disciplines.⁸⁶ Cardozo was a pragmatist;⁸⁷ law-and-economists are theoretical and doctrinaire.⁸⁸ And more than any other figure in American history, Cardozo symbolizes a dynamic common law.⁸⁹ That is why Cardozo arouses enough passion to move someone like Posner to investigate the "mystery" of his reputation.

85. BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 133 (1924).

86. "[T]o most modern readers of [Cardozo's] *The Nature of the Judicial Process* sociology is the name of a failed social science," writes Posner. POSNER, *supra* note 74, at 26.

87. See POSNER, *supra* note 74, at 142-43.

88. "[M]y criticism of our modern regime is analytical, not empirical," Priest concedes, for example. George L. Priest, *Can Absolute Manufacturer Liability be Defended?*, 9 YALE J. ON REG. 237, 243 (1992).

Anthony T. Kronman describes two competing traditions: the Hobbesian tradition, into which he places both scientific realism and law-and-economics movement; and the Aristotelian tradition, into which he places prudential realism—and to which Cardozo clearly belongs. KRONMAN, *supra* note 59, at 165-270.

89. When one thinks about champions of the common law, one thinks also of Holmes and his great work, *The Common Law*. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881). Cardozo was profoundly influenced by Oliver Wendell Holmes, as he Cardozo himself acknowledged. Benjamin N. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682 (1931). Yet Cardozo was more progressive than Holmes. Both liberals and conservatives claim Holmes as one of their own, *see, e.g.*, CLINTON L. ROSSITER, *CONSERVATISM IN AMERICA* 5, 159-60 (1955), but no one would put Cardozo in any but the liberal camp. Cardozo was a deft practitioner of liberal pragmatism. He did not develop an elaborate jurisprudential philosophy in law review articles or dissenting opinions; he won the support of colleagues and wrote majority decisions, moving the law forward in ways that even traditionalists could respect. This makes him seem all the more dangerous to those who do not share his philosophy. Posner wrote:

[I]t should be apparent that it is the very caution, modesty, and reticence of the [MacPherson] opinion that explains its rapid adoption by other states. *MacPherson* is the quietest of revolutionary manifestos, the least unsettling to conservative professional sensibilities.

POSNER, *supra* note 74, at 109.

The two paradigms are structured upon different belief about human nature. Benjamin Cardozo was interested in sociology and psychology because he believed that human behavior was the result of complex forces. Those who seek to explain human behavior primarily through economic principles have a different premise. Law-and-economics assumes that consumers are "rational maximizers," that is, that consumers rationally make purchasing decisions by weighing the cost of a particular product against its benefits.⁹⁰

One of the costs of a product is the risk of being injured while using it, but consumers are not always fully informed about such risks.⁹¹ Legal economists recognize that this cannot always be corrected by requiring manufacturers to communicate the risks through printed materials since consumers do not always have the skill, or the time, to read detailed sets of warnings for all of the products they use.⁹² Posner argues that strict liability provides an efficient way of communicating this information. When strict liability drives the price of the product up by a sum equal to the risk, it has essentially provided this information to the consumer. As Richard A. Posner describes it: "Strict liability in effect impounds information about product hazards into the price of the product, resulting in a substitution away from hazardous products by consumers who may be completely unaware of the hazards."⁹³

The theory is elegant but rests entirely on the assumption that consumer decisions are rational. This is a shaky foundation.⁹⁴ Legal economists have

90. See generally Tushnet, *supra* note 59. For a critique of other assumptions of law-and-economics, see A. Mitchell Polinsky, *Economic Analysis as a Potentially Defective Product: A Buyer's Guide to Posner's ECONOMIC ANALYSIS OF LAW*, 87 HARV. L. REV. 1655 (1974).

91. Priest contends that "[e]xcept where intentionally self-inflicted, all product-related injuries can be said to derive from insufficient information about product risks." George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 32 (1987) (emphasis added).

92. But cf. W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 109-10 (1992) (reporting that label warnings increase the frequency of consumer precautions); and Note, *Harnessing Madison Avenue: Advertising and Product Liability Theory*, 107 HARV. L. REV. 895, 902 (1994) (reporting that consumers look even more to advertising to appraise them about product quality and safety). Both of these sources, however, rely on consumer surveys, and consumers may overestimate how much information they acquire or how well they act on it.

93. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 166 (3d ed. 1986).

94. See generally Jay M. Feinman, *Relational Contract and Default Rules*, 3 S. CAL. INTERDISCIPLINARY L.J. 43 (1994) (questioning the assumption of the rational maximizer in the context of default rules analysis).

worked mightily to show that people behave rationally when they buy lottery tickets⁹⁵ or smoke cigarettes.⁹⁶ Some would say they are on a fool's errand, yet it is one that legal economists must undertake to defend their philosophy. In the introduction to his article about lottery players, legal economist Edward J. McCaffery writes: "It is crucial to the economic enterprise to take the presumption of rationality as far as possible, in order to live up to the liberal ideals of consumer sovereignty and non-paternalism."⁹⁷

Can McCaffery persuasively argue that lottery players are rational maximizers? Here in a nutshell his argument:

Consider a twenty-five-year-old person making a large, but not unusual, expenditure of fifty dollars a month on the lottery, in a world that, for simplicity, has no inflation. Assume that she plays a lotto game that has a one in one million chance of yielding a \$500,000 prize. . . . Over a forty-year working career, our player has an approximately forty-two to one chance of one day winning the prize. Now forty-two to one are still long odds, but not wildly so; there is something not completely irrational in the belief that, if one steadily plays lotteries, one day her numbers will come in.⁹⁸

What McCaffery is saying, simply, is that it is rational for someone who wants to be rich to pay \$24,000 for one chance in forty-two of winning half a million dollars.⁹⁹ He attaches significance to his hypothetical player spending \$24,000 over forty year period rather than all at once, but in fact this makes no difference as to whether this is a rational strategy for maximizing wealth: either way, the player pays \$24,000 for a 2.4% chance of winning half a million taxable dollars; and, either way, in a typical state lottery the player is in a game with a payoff ratio of fifty percent, *i.e.*, players collectively receive \$500,000 in prizes for every million dollars they spend for tickets.¹⁰⁰ The immutable fact is that "rational maximizers" do not buy lottery tickets.

As anyone who knows anything about human nature understands, people play the lottery because they find it exciting, because it provides them with a period of time to hope and dream, because they believe that some supernatural

95. Edward J. McCaffery, *Why People Play Lotteries and Why it Matters*, 1994 WIS. L. REV. 71, 93.

96. W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* (1992). See also Nicholas Eberstadt, *Are Smokers Rational?*, PUB. INTEREST, Spring 1993, at 109.

97. McCaffery, *supra* note 95, at 73. Libertarian would be a more appropriate word than *liberal*.

98. McCaffery, *supra* note 95, at 106.

99. Fifty dollars per month over forty years is \$24,000.

100. McCaffery, *supra* note 95, at 73.

force may intervene on their behalf, or out of some uncontrollable compulsion fueled by greed or desperation. McCaffery reports that state lotteries are only successful when they allow players to pick their own numbers, that certain numbers like 333 and 777 are especially popular, that surveys show that many lottery players believe it takes skill to pick the right number and that many consult psychics for help in doing so.¹⁰¹ Yet he rejects the idea that players are motivated by superstition—as must any legal economist worth his salt. "For economics to maintain its prescriptive power," he writes, "we must be able to say that most agents are rational in a non-tautological sense, measured, in part, by a demonstrable, if limited, domain of irrationality."¹⁰²

Law-and-economics defends the concept of the rational maximizer at all costs; its libertarian structure is based on the view that the deal between producer and consumer ought to be respected because the consumer knows what he is. While law-and-economics claims to be protecting the consumer, however, it more clearly protects the manufacturer. Its bottom line is that the producer should be permitted to sell whatever the consumer will buy, provided only that the consumer is fully informed. Thus, legal economists argue that the only function of products liability law should be to encourage producers to provide information to consumers and to give consumers a remedy when they are unpleasantly surprised by latent defects, provided that the manufacturer has not disclaimed such liability in its warranty.

No one today relies on privity, as Lord Abinger did in *Winterbottom v. Wright*.¹⁰³ Yet the core principles of Abinger's Paradigm are much the same today as they were in 1842: Courts serve public policy best by protecting the right of contract; the proper focus is on the relationship between seller and buyer; private parties are competent to protect themselves. One of most recurring themes is that courts will wreck havoc if they attempt to use the common law to advance broader public policy goals. In *Winterbottom v. Wright*, Lord Abinger worried that if the injured driver of a stagecoach were permitted to sue the manufacturer who had agreed to keep the stagecoach in good repair, then "every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action," and "the most absurd and outrageous consequences, to which I can see no limit, would ensue."¹⁰⁴ Henderson and Twerski made essentially the same argument with the hypothetical of the plaintiff who, lousy from pasta and beer and absorbed in a book, trips on a roller skate and crashes into his television set.¹⁰⁵ In somewhat more sophisticated form, legal economists raise the

101. McCaffery, *supra* note 95, at 82, 86-87.

102. McCaffery, *supra* note 95, at 92 (emphasis in original).

103. 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

104. *Id.* at 54.

105. Henderson, *supra* note 46, at 1280-81.

same specter of chaos. A passage from the writings of Judge Stephen F. Williams, who is a member of the law-and-economics school, provides an example:

[C]onsider the consumer choice between fresh fruits and vegetables and all other foods. If courts start to award damages for increased risk of cancer due to pesticides used to grow fruits and vegetables, the liability would drive up the price of fresh fruits and vegetables and reduce their consumption. There is reason to believe, however, that these foods are among the most effective reducers of cancer risk. . . . Thus, pesticide liability, although it might cause some desirable substitutions of safer pesticides, could actually increase the number of deaths from cancer.¹⁰⁶

Judge Williams has set up the same straw man as Lord Abinger and Henderson and Twerski. No one advocates that strict liability be imposed on all products or even on all products with some form of risk. Under the risk-utility test, liability attaches only to *unreasonably* dangerous products. Some people may choke to death on pieces of apple, but they don't have product liability claims because the benefits of apples outweigh their risks. Similarly, pesticide-treated fruits and vegetables will not be subject to strict liability as long as their benefits outweigh their risks. Cardozo's Paradigm does not mean strict liability has no limits or that courts shut their eyes to the consequences of imposing strict liability.

One of the most basic tenets of Abinger's Paradigm—the belief that consumers can protect themselves—is not sufficiently questioned by legal economists. Do consumers' ability to protect themselves not diminish as products become more complex? Can consumers discern the crashworthiness of various cars, for example? Richard A. Epstein seems to have nothing but scorn for such a question. The only factor that really matters is the mass of the car, he argues, and consumers who want crashworthy cars buy large cars.¹⁰⁷ "Everyone knows that it is riskier to drive a Volkswagen than a Mercedes," he says.¹⁰⁸ When pressed as to whether this is all consumers really need to know, Epstein says that consumers can always take a test drive or read *Consumer Reports*.¹⁰⁹ But, in fact, Epstein's view is oversimplified.

106. Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932, 940 (1993). Judge Williams sits on the United States Court of Appeals for the District of Columbia Circuit, having been appointed to the bench in 1986 by President Bush.

107. Remarks of Richard A. Epstein, *Session Two*, 10 CARDOZO L. REV. 2287, 2292 (1989) (arguing that two factors—mass and speed of impact—transcend all other variables relating to passenger safety).

108. *Id.*

109. Remarks of Richard A. Epstein, *Session One*, 10 CARDOZO L. REV. 2227,

Although large cars are safer than small cars when both have similar designs, a study conducted for the Department of Transportation showed that a crashworthy subcompact can afford greater protection than a car twice its size with an inferior design.¹¹⁰ Furthermore, there are wide variances in crashworthiness among cars in the same size range.¹¹¹ Epstein ignores the fact that organizations such as Consumers Union (which publishes *Consumers Reports*) have a limited ability to acquire relevant information, particularly with respect to new models that do not yet have highway safety records, as well as the reality that not all consumers have the skills to research sources such as *Consumers Reports*. Unquestioned faith in the consumer's ability to protect himself is common within Abinger's Paradigm, however, while Roger Traynor's belief that "the consumer no longer has means or skill enough to investigate for himself the soundness of a product" reflects the opposing creed of Cardozo's Paradigm.¹¹²

Notwithstanding the inconsistency with a belief in the competent consumer, contractarians often argue that strict liability encourages reckless behavior.¹¹³ Epstein, for example, argues that people are more likely to joyride at high speeds or drive drunk under the regime of strict liability.¹¹⁴ He builds this argument within the framework of "moral hazard," an insurance term that refers to conduct by insureds that is intended, or is more likely, to trigger insurance payments.¹¹⁵ "Moral hazard" occurs when there are incentives to act wrongfully—to commit suicide so a beneficiary may collect insurance, to malingering or overutilize medical services because the costs of doing so are borne by others.¹¹⁶ Epstein's argument that products liability encourages recklessness is extrapolated from data showing that people take less precautions with items of personal property that are insured than they do

2235 (1989).

110. RALPH NADER & CLARENCE DITLOW, *THE LEMON BOOK* 261 (1990). *Cf.*, *Too Small to be Safe?*, TIME, Nov. 11, 1991, at 53.

111. NADER & DITLOW, *supra* note 110, at 261. *See also* JACK GILLERS, *THE CAR BOOK* 28-29 (1992).

112. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring). *See generally* Michael T. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583 (1990) (discussing, in the context of the form consumer contracts, whether market forces will eliminate consumer ignorance).

113. *E.g.*, Richard A. Epstein, *Products Liability as an Insurance Market*, XIV J. LEGAL STUD. 645, 653 (1985).

114. *Id.* at 668.

115. *Id.* at 653; Polinsky, *supra* note 90, at 1671.

116. *See* JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 117 (1989); VISCUSI, *supra* note 92, at 84-85.

with those that are uninsured.¹¹⁷ It is one thing, however, to be more disposed to take a valuable camera along on a trip if it is insured; it is something quite different to be more inclined to drive recklessly because, if injured, one might have a claim against the automobile manufacturer for not producing a more crashworthy car.

The concern with moral hazard illustrates one of the most important distinctions between the paradigms: Abinger's Paradigm focuses on how strict liability influences consumer behavior while Cardozo's Paradigm is concerned with how it influences manufacturers. However, it is not at all clear that products liability law affects consumer conduct. We may reasonably expect that Ford Motor Company is well informed on the state of the law by its attorneys and that its managers take potential liability into account in considering how much to spend on safety, but are we to assume that consumers keep current on products liability law? That is the least of the difficulties. Given the uncertainties inherent in litigation, even the fully informed consumer could not predict that if he were injured in some accident, the circumstances of which he cannot foresee, he would prevail in a lawsuit. Moreover, sane individuals do not risk death or serious injury even if in a legal or economic sense they can be "made whole" through financial recovery.

Finally, and perhaps most significantly, Abinger's Paradigm fails to deal with the fact that victims are not always consumers. A large portion of product liability claims arise from the work place, and workers are injured with equipment they did not choose and by exposure to substances they did not control. Should a forklift operator who, in a moment of carelessness, reached forward to adjust the load in front of him, inadvertently pressing against a lever and causing the lift to descend and sever both of his arms, have a cause of action if he can show that the accident would have been prevented by a plexiglass screen in front of the operator's cab?¹¹⁸ Advocates of Abinger's Paradigm will argue that he should not. The victim can only blame himself, they will argue; he assumed the risk, either when he foolishly tried to adjust the load from his seat rather than climbing down to adjust it from the floor or when he took the job in the first place. Notwithstanding theories that employers and workers bargain over risks and wages and that workers are paid for the hazards they face,¹¹⁹ most courts reject the view that workers

117. Epstein, *supra* note 113, at 653.

118. Johnson v. Clark Equip. Co., 547 P.2d 132 (Or. 1976).

119. Much effort is expended trying to show that workers are paid to take risks. Kip Viscusi notes that "[u]nlike stuntmen and other workers who received clearly significant hazard premiums, blue-collar workers in the more hazardous occupations do not receive additional remuneration that is sufficiently great to be visible to the casual observer." Not satisfied with a finding that is inconsistent with the view that human behavior may be explained economically, Viscusi found that by considering

voluntarily assume job-related risks.¹²⁰ Workers, moreover, are not the only ones who are who are exposed to risks they cannot control. Everyone who travels on the highway depends not only on the safety of her own vehicle but on those that share the road with her; everyone who puts his child on a school bus hopes that the tires on the bus are sound.

Despite its popularity in academic circles, therefore, law-and-economics offers little for the future of products liability. Many of its canons are out of sync with modern realities, and its theoretical elegance is not matched by a practical utility. This is a criticism that law-and-economics scholars will find particularly unfair; they take pride in having grounded their school of legal thought in what they believe is the hardest of the social sciences. Yet law-and-economics is profoundly quixotical, which is why it has been a strong force within the professorate and not on the bench.

If law-and-economics cannot revive it, Abinger's Paradigm will continue to recede, for it is increasingly anachronistic. Cardozo's Paradigm faces a different set of problems. It offers a doctrine that is relevant to contemporary problems, as courts are coming to recognize, but it raises a number of jurisprudential issues. Its public policy orientation seems, to many, more appropriate for the legislature than for a judicial body.¹²¹ They believe that courts usurp legislative authority when they assume the role of evaluators of the social utility of various products. They find the risk-utility balancing test particularly problematic for, they fear, there is nothing to stop courts from imposing their own subjective values on the parties before them and, indeed, society as a whole. "Rules of thumb make the law workable," writes Richard A. Epstein, while open-ended balancing test reflect "doctrinal poverty."¹²² If Cardozo's Paradigm is eventually to achieve wide acceptance it must be

"not the absolute level of compensation but the implicit values that workers associate with death or injury" (by which I take it he means correlating wages with perceived rather than actual job risks), Viscusi was able to produce "magnitudes [that] are at least suggestive in that they indicate substantial wage compensation for job hazards." VISCUSI, *supra* note 92, at 40-41. It seems safe to say, therefore, that evidence supporting the position that workers bargain over risks is, at best, quite weak.

120. *Johnson*, 547 P.2d at 141 (holding, in the case described, that it could not be said as a matter of law that workers assume the risks of their jobs, and thus allowing the issue of assumption of risk to be determined by the jury). See also *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367, 380 (E.D. Ark. 1971); *Cremeans v. Willmar Henderson Mfg. Co.*, 566 N.E.2d 1203, 1207 (Ohio 1991); *Brown v. Quick Mix Co.*, 454 P.2d 205, 208 (Wash. 1969).

121. "[W]e have lost any real sense of the appropriate distribution of power between courts and legislatures," writes Epstein. Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2196 (1989).

122. Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 471, 477 (1987).

able to answer these concerns—and it must be able to do it in the context of generic liability, where the argument of a judicial usurpation of legislative authority resonates with greatest force.

II. GENERIC LIABILITY

A. An Overview

"Product category liability,"¹²³ or "generic product risks,"¹²⁴ as it is sometimes called, refers to the situation that obtains when strict liability attaches to an entire class of products, regardless of how they have been designed, manufactured, or marketed. This occurs when a product generically fails a risk-utility test, that is, when a product remains unreasonably dangerous despite the best possible design, construction, and warnings to the consumer.

In the typical case, the plaintiff argues that the product lacked something that would have made it safer: a sanding machine should have been equipped with a guard;¹²⁵ a boat¹²⁶ or lawn mower¹²⁷ should have had a deadman's switch; a nightgown should have been treated with a flame retardant;¹²⁸ an automobile gas tank should have been lined with a nylon bladder.¹²⁹ Although the focus is on the product rather than the manufacturer's conduct, there is nevertheless the idea of what the defendant did wrong—he sold a machine without a guard or a boat without a deadman's switch. He is morally culpable because he put a product into commerce knowing that it was unsafe in some fashion; if he was not aware of the unsafe characteristic, he must shoulder the responsibility for his ignorance.¹³⁰ The

123. This is the term favored by Henderson and Twerski. See Henderson & Twerski, *Closing the American Frontier*, *supra* note 46, at 1297-1331; Henderson & Twerski, *Proposed Revision of Section 402A*, *supra* note 47, at 1520-21.

124. Joseph A. Page, *Generic Product Risks: The Case Against Comment k and For Strict Liability*, 58 N.Y.U. L. REV. 853, 853 (1983).

125. *E.g.*, Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1034 (Or. 1974).

126. *E.g.*, Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 745 (Tex. 1980).

127. *E.g.*, Burch v. Sears, Roebuck & Co., 467 A.2d 615, 618 (Pa. Super. Ct. 1983).

128. *E.g.*, Ellsworth v. Sherne Lingerie, Inc., 495 A.2d 348, 350 (Md. 1985).

129. *E.g.*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 361 (Cal. Ct. App. 1981).

130. This raises one of the most important and controversial issues in products liability law: Should a manufacturer be held strictly liable if she took every reasonable step to make her product safe but did not know about—and, at the time, could not have reasonably learned of—the hazard? This is sometimes called the state-of-art issue, sometimes referred to as the time dimension issue, sometimes discussed in terms of imputed knowledge. No one has summed it up in a simpler or clearer fashion than

deficiencies in the product and in defendant's conduct are flip sides of the same coin, and thus products liability is not divorced from traditional fault-based values.

When, however, a product is condemned generically, the court appears activist and doctrine seems detached from traditional values. It is one thing to say that a motorcycle is unreasonably dangerous unless it has crash bars¹³¹ or saddlebags¹³² to protect the rider in an accident, but it is quite

John F. Vargo:

Admit it! Strict liability in the warning case of unknowable dangers asks the manufacturer to do what it cannot do, period. . . . However, the critics [of this approach look] at only one half of the arguments concerning the imputed knowledge rule. . . . It is true, from the manufacturer's view, that something is wrong with strict liability since it asks the impossible. It is not fair. It is illogical. But, the argument about fairness and logic is just as valid when liability in the warning cases is observed from the consumer's viewpoint. When a consumer is confronted with the danger in a product which cannot be discovered, then you are asking the consumer to do the impossible. The danger in the product is unknowable and undiscoverable by the consumer. It is illogical to hold the consumers responsible in such situations. . . . When the issue is so framed the only question remaining is one of policy; who between these two innocent parties should bear the loss?

John F. Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?*, 10 *TOURO L. REV.* 21, 32-33 (1993).

Two observations may be made that are germane to the issues under discussion. The first is that Vargo automatically puts the question in the context of failure to warn. He wrestles with whether a manufacturer should be liable for *not warning of a danger* that he, the manufacturer, did not know about when he sold the product rather than whether the manufacturer should be liable for *selling an unreasonably dangerous product* even though he did not know the full extent of its risks. This reflects the ingrained but unfortunate tendency to analyze cases in terms of a failure to warn, which will be discussed at some length in the main body. See *infra* note 149 and accompanying text. The second observation is that while Vargo correctly recognizes that this is a policy question, he focuses on risk allocation. In the context of Cardozo's Paradigm, deterrence may be the more important policy consideration. The concern is that if manufacturers are permitted to insulate themselves from liability by showing that they did everything reasonable to discover possible hazards, they will focus more on building records of reasonable investigation than on identifying potential hazards.

131. *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240, 1242 (Colo. 1987).

132. *Pietrone v. American Honda Motor Co.*, 235 Cal. Rptr. 137, 139-40 (Cal. Ct. App. 1987). A motorcycle passenger was severely injured when, as a result of an accident with another vehicle, her leg came into contact with the rotating rear of the motorcycle on which she was riding. The plaintiff offered no evidence that an alternative design would have prevented this injury. The court held that a plaintiff need not demonstrate that an alternative design was available, at least unless the

another to say that motorcycles are unreasonably dangerous per se. Some would see such a decision as an attack on free choice, challenging the right of the individual to govern his own activity and "determine his own fate."¹³³ This view may be expressed in the language of products liability law as follows: A product cannot be *unreasonably* dangerous if an individual, with full knowledge of the risks, has voluntarily elected to use it. In such a circumstance the individual has decided that, for him, the benefits of the product justify its risks.

To follow the motorcycle example, assume that nineteen-year-old John Doe buys his first motorcycle. The following week, while traveling on a highway at forty-five mph, he hits a small rock, loses control of the motorcycle and slams into a telephone poll at the side of the road. The accident leaves him paraplegic. He sues the motorcycle manufacturer, not because there was some defect in the workmanship or because the motorcycle could have been designed to be more stable after hitting small objects, but merely that motorcycles are unreasonably dangerous. He offers statistical data showing that motorcycle riders have a fatality rate about twenty-five times greater than that of automobile occupants.¹³⁴ He argues that the costs that motorcycles impose on society-at-large exceed their benefits, and therefore strict liability applies.¹³⁵ The manufacturer would assert the assumption of risk defense, which bars one from recovering after "voluntarily and unreasonably proceeding to encounter a known danger,"¹³⁶ and would almost

defendant offers evidence that justifies its particular design. It went on, however, to note that it was "self-evident" that a number of devices, including saddlebags, would have prevented plaintiff's injury.

133. *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330, 338 (5th Cir. 1984).

134. This is, in fact, the case. The mileage death rate for motorcycle riders in 1991 was estimated at about 37 deaths per 100 million miles travelled compared to approximately 1.5 deaths per 100 million miles for occupants of other types of vehicles, including passenger cars, buses and trucks. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 64 (1992 ed.).

135. The risk-utility test weighs the risks and utility to society as a whole. *See, e.g., Valenti v. Surgiteck-Flash Medical Eng'g Corp.*, 875 F.2d 466, 467 (5th Cir. 1989).

136. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. n. This defense generally employs a subjective test. *E.g., Moran v. Raymond Corp.*, 484 F.2d 1008, 1015 (7th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); *Andren v. White-Rodgers Co.*, 465 N.W.2d 102, 105 (Minn. Ct. App. 1991). It is not enough that John Doe should have known that motorcycles were dangerous; defendant must show that John Doe actually knew of and appreciated the dangers of motorcycling. *E.g., Heil Co. v. Grant*, 534 S.W.2d 916, 921 (Tex. Ct. App. 1976). In making that determination, however, the jury may take into account the fact that the risks of motorcycle riding are both obvious and well-known. *See, e.g., Gann v. International Harvester Co. of Canada, Ltd.*, 712

certainly prevail.¹³⁷ John Doe's lawsuit offends fundamental social mores—with freedom comes responsibility, and someone who has freely made a choice should not later be heard to complain about the consequences.

But what about those who have been injured without assuming the risks? If John Doe careened into a pedestrian instead of a telephone poll, should the pedestrian be able to bring a products liability action against the motorcycle manufacturer on a generic risk theory?¹³⁸ Should the party paying John Doe's medical expenses be able to recover those costs from the manufacturer? In modern society, John Doe will almost never pay his own medical expenses. The costs will be borne by a private insurance company or a government program such as Medicare or Medicaid; if no third party is responsible, the medical provider will be forced to absorb most of the costs itself (and try to recoup them by charging other patients enough to cover the institution's free care and bad debt). This means the financial consequences of motorcycle riding are borne by everyone, not merely by motorcycle riders. Private markets may internalize risks—by requiring motorcycle riders to pay higher insurance premiums, for example—and people of all political persuasions generally find that to be fair.¹³⁹

S.W.2d 100, 105 (Tenn. 1986). Some tort reform statutes substitute an objective standard. New Jersey legislation, for example, precludes liability when the unsafe characteristics of the product "are known to the ordinary consumer or user, and . . . would be recognized by the ordinary person who uses or consumes the product with ordinary knowledge common to the class of persons for whom the product is intended" N.J. STAT. ANN. § 2A:58C-3a(2) (West 1989).

137. Defendant would probably not even have to face a jury trial. In one case, a motorcyclist argued that the manufacturer should have warned him "of the inconspicuous nature of motorcycles during daylight hours." The court dismissed the case, holding that the manufacturer need not have warned plaintiff because the danger "is open and obvious." *Verna v. U.S. Suzuki Motor Co.*, 713 F. Supp. 823, 828 (E.D. Pa. 1989). See also *Shaffer v. A.M.F., Inc.*, 842 F.2d 893, 898 (6th Cir. 1988).

138. An interesting question is whether plaintiff must show that motorcycles constitute an unreasonable risk to pedestrians. It might be argued that is required to establish proximate cause between the unreasonably dangerous nature of motorcycles and plaintiff's injury. A separate showing should not be required for products (e.g., handguns, radar detectors) that inherently put nonusers at risk. See generally George A. Nation, III, *Products Designed for Illegal Use—Proposed Rule for Suppliers who Profit from Illegal Activity*, 91 DICK. L. REV. 657 (1987).

139. Even conservative William Safire believes smokers should pay more for insurance. "[I]t's a free country," he writes, "but if you choose to run a risk, you have no right to demand your neighbor share the cost of your risk." William Safire, *Let's Make a Deal on Health*, N.Y. TIMES, May 23, 1994, at A15. Yet there is often confusion when products liability internalizes risks by requiring those who benefit from certain products, sellers and users, to bear the costs.

Those who subscribe to Abinger's Paradigm often conclude that products liability ends at the point a warning is given. That is, if whatever is wrong with the product cannot be cured, the manufacturer's final duty is to make sure the consumer is informed of the risk.¹⁴⁰ As previously discussed,¹⁴¹ Abinger's Paradigm is principally concerned with the seller-purchaser relationship and tends to ignore bystanders and others who are involuntarily affected by products they do not use. Cardozo's Paradigm mandates a different rule: One has a duty not to distribute an unreasonably dangerous product, and thus if the product cannot be made reasonably safe—whether by better construction, design, or warnings—one's duty is to not sell it at all. It is important to note that the two paradigms are not divided over whether users who have voluntarily assumed the risk should be able to recover; the assumption of risk defense is equally at home in either paradigm.¹⁴²

The issue of whether a manufacturer may insulate itself from all liability by warning the consumer about unavoidable risks is one of the most persistent and obscured questions in products liability law. The comments to section 402A make only oblique passes at the issue. Comment j states that "a product bearing . . . a warning, *which is safe for use if it is followed*, is not in defective condition, nor is it unreasonably dangerous,"¹⁴³ which does not squarely confront the issue of whether products may bear a warning and yet be considered unsafe. Comment k, titled "unavoidably unsafe products," speaks of "products which, in the state of human knowledge, are quite incapable of being made safe for their intended and ordinary use."¹⁴⁴ But this comment focuses exclusively on products which are *reasonably* dangerous, such as the Pasteur rabies vaccine which carries significant risks but is the only effective treatment against a disease that, in the words of the comment, "invariably leads to a dreadful death."¹⁴⁵ As long as a product is

140. See, e.g., *Jackson v. Nestle-Beich, Inc.*, 589 N.E.2d 547, 552 (Ill. 1992) (holding that a manufacturer may always insulate itself from liability by placing an adequate warning on the product container).

141. See *supra* text accompanying notes 118-20.

142. However, it would be objectionable within the framework of Cardozo's Paradigm to apply the assumption of risk defense vicariously. That is, for reasons of fundamental social mores, a tobacco company should be able to assert the assumption of risk defense against a plaintiff who smoked its cigarettes. But it should not be able to assert that defense against a third party who is responsible for the smoker's medical expenses, even though this may traditionally have been a subrogation claim under which the defenses against the smoker were also applicable to the insurer. Where harm is falling upon innocent third parties, the deterrence objective comes into play and, within Cardozo's Paradigm, litigation should be not discouraged.

143. RESTATEMENT (SECOND) OF TORTS § 402A, cmt. j (1964) (emphasis added).

144. *Id.* at cmt. k.

145. *Id.*

made as safe as possible and accompanied by appropriate warnings so that the user can make an informed choice, "an apparently useful and desirable product, attended with a known but apparently reasonable risk,"¹⁴⁶ will not be subject to strict liability. The Pasteur vaccine, therefore, does not escape liability merely because it is an unavoidably unsafe product but because it is an unavoidably and *reasonably* unsafe product.¹⁴⁷ The comments do not answer the question whether, for example, someone who sold a remedy for the common cold that entailed the same degree of risk as the Pasteur vaccine, and who provided a clear warning about the product's risk, would be subject to strict liability.

It has not been only in the comments to section 402A that respected authorities have danced away from this question. When he attempted to define the term "unreasonably dangerous" twenty-five years ago, Page Keeton alluded to, but glossed over, the question of whether there are instances when a reasonable man would not market a particular product even with the best possible warnings:

[A] product ought to be regarded as "unreasonably dangerous" at the time of sale if a reasonable man with knowledge of the product's condition, and an appreciation of all the risks found to exist by the jury at the time of trial, would not now market the product, *or, if he did market it, would at least market it pursuant to a different set of warnings and instructions as to its use.*¹⁴⁸

One of the most serious consequences of the uncertainty over this issue is rampant overuse of the failure-to-warn theory. Unsure about how generic liability cases would be received, plaintiffs generally try to categorize such actions as failure-to-warn cases. That is, instead of arguing that a product is unreasonably dangerous because its risks exceed its benefits, plaintiffs typically opt for the more modest approach of arguing that the seller failed to warn of the risks.¹⁴⁹ Even if the seller did, in fact, warn of the risks,

146. *Id.*

147. Twerski has previously, and properly, noted that in these kinds of situations the warning may not so much reduce the hazard to reasonable levels as respect the value of free choice, or as he put it, "[t]he legal parameters for this problem belong more to the law of 'informed consent' than to the law of products liability." Aaron D. Twerski et al., *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 CORNELL L. REV. 495, 519 (1976).

148. W. Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 568 (1969) (emphasis added).

149. Twerski recognized this quite some time ago when he said that it has long been "an article of faith . . . that when a court is faced with the alternative of deciding

plaintiffs simply argue that he did not do so effectively. Everyone is happy to go along with this ruse. No defendant wants to point out that the real issue is whether his product is unduly hazardous even with a warning, and few courts are eager to take on the role of appearing to "ban" a product when a case may be portrayed merely as involving the adequacy of a warning.

Henderson and Twerski argued that because it purports to reflect the consensus view, the new Restatement should take a firm position against generic liability.¹⁵⁰ "[P]roduct-category liability is not now the governing law in any jurisdiction," they declare.¹⁵¹ The Restatement does in fact exclude generic liability.¹⁵² Yet product category liability has not been

a case on either design defect grounds or failure-to-warn grounds, the latter is the easier and preferable approach." Twerski et al., *Use and Abuse of Warnings*, *supra* note 147, at 500.

150. Henderson & Twerski, *A Proposed Revision of Section 402A*, *supra* note 47, at 1520-21, 1529.

151. Henderson & Twerski, *Closing the Frontier*, *supra* note 46, at 1315.

152. It eliminates generic liability by barring any claim that does not fit within one of three rigidly defined categories—manufacturing defect, design defect, or warning defect. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1(b) (Council Draft No. 2, Sept. 2, 1994). The only category potentially applicable to generic liability is design defect, which is defined as follows: "[A] product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design" *Id.* § 2(b). Comment c states that the requirement "that plaintiff show a reasonable design applies even though the plaintiff alleges that the category of product sold by the defendant is so dangerous that it should not have been marketed at all." Alcohol, tobacco, firearms, and above ground swimming pools are offered as examples.

An earlier draft contained a paragraph acknowledging that "[s]everal courts have suggested that some product categories have such a high degree of danger and such low social utility that liability should attach even if the plaintiff is unable to establish a reasonable alternative design." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY cmt. c, at 23 (Council Draft No. 1A, Jan. 4, 1994). The paragraph went on to say that if a court were to select a sufficiently "narrow characterization of the product category, it might well conclude that liability should attach without proof of a reasonable design." *Id.* at 24. Apparently, it was felt that this left the window of generic liability partly open, and the paragraph was deleted in the next draft. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY cmt. c (Tentative Draft No. 1, April 12, 1994). Later a rewritten paragraph was reinserted, reading in part: "Several courts have suggested that *the designs* of some products are so manifestly unreasonable, in that they have such low social utility and high degree of danger, that liability should attach even absent proof a reasonable alternative design." Addendum (May 25, 1994). The paragraph concludes by suggesting that a court would not condemn a product generically unless "no rational adult, fully aware of the relevant facts, would choose to use or consume the product." It would be hard to devise a

universally rejected. First, as just noted and the forthcoming discussion about asbestos and tobacco will demonstrate, generic cases often masquerade as failure-to-warn claims.¹⁵³ Second, strict liability has been imposed on a number of product categories, including slingshots,¹⁵⁴ above-ground swimming pools,¹⁵⁵ and escalators.¹⁵⁶ Third and most important, however,

more restrictive test. *Id.*

153. Henderson and Twerski are aware of the rampant overuse of the failure-to-warn theory. The problem is so severe, says Henderson, that "the common law governing liability for inadequate product warnings is on the edge of total collapse." James A. Henderson, Jr., *The Efficacy of Organic Tort Reform*, 77 CORNELL L. REV. 596, 607 (1992) (book review). They attribute this largely to judicial confusion over the patent danger rule; they believe courts properly abandoned the patent danger rule in design cases but then, through sloppy thinking, also did so in warning cases. James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 280-85 (1990). This is a contributing factor, but so is the practice of disguising generic cases as failure-to-warn cases.

154. *Moning v. Alfono*, 254 N.W.2d 759 (Mich. 1977). Although the court purports to base its decision in negligence, its focus on the product rather than manufacturer conduct employs classic risk-utility balancing. The court held that even though slingshots "have been used for hundreds of years by both adults and children, the common law is not immutable" and that the question of whether slingshots are unreasonably dangerous in society today should be decided by judge and jury. *Id.* at 774. It held that judicial action is not precluded by an absence of legislation banning or restricting the sale of slingshots; rather, "it is unavoidably the Court's responsibility to continue to develop or limit the development of [common law negligence] absent legislative directive." *Id.* at 764. The court stressed that plaintiff was not challenging the manufacturing and marketing of slingshots per se but only the marketing of slingshots directly to children. *But see* *Aimone v. Walgreen's Co.*, 601 F. Supp. 507 (N.D. Ill. 1985) (holding that, despite numerous similar injuries, lawn darts are not subject to strict liability because their danger is obvious—presumably even to the two-year-old in this case whose brain was pierced by the lawn dart that fell upon him).

155. *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983). Because of the outrageousness of the underlying facts, this is the case that opponents of generic liability most love to hate, and it has become the best known of these three cases. A 23-year-old trespasser was severely injured when he dove head first into three-and-a-half feet of water in an above-ground swimming pool; indeed, he may even have dived from the roof of a garage. The pool had "Do Not Dive" decal warnings. The trial dealt largely with whether the vinyl bottom of the pool was unreasonably dangerous but plaintiff's expert testified that he knew of no safer alternative material. The court held that "even if there are no alternative methods of making bottoms for above-ground pools, the jury might have found that the risk posed by the pool outweighed its utility." *Id.* at 306. The court did not hold that above-ground swimming pools were unreasonably dangerous, only that this was a jury question. To the best of my knowledge, no jury has so found, including the one in this case.

is the fact that based on years of evolving experience, the highest courts of three states decided to impose strict liability on three important product categories—*asbestos*, *cigarettes*, and *"Saturday Night Specials"*—only to have those decisions overturned by state legislatures. The next three sections of this Article will tell those stories, illustrating how the state legislatures have been recruited in the war against products liability and the common law.

B. Asbestos

Asbestos is the prime example of how generic liability cases are often mischaracterized as failure-to-warn matters. A strong argument can be made that asbestos is unreasonably dangerous regardless of whether it is sold with a warning. The costs that asbestos impose on society are great; 50,000 people in the United States die each year from asbestos-related cancers and other diseases, and many more are incapacitated in varying degrees by asbestosis, a progressive lung disease.¹⁵⁷ The amount of injuries is reflected in the staggering number of asbestos claims; a total of about 200,000 asbestos cases have been filed to date.¹⁵⁸ Although it is extremely useful, asbestos is not essential; other insulating materials are available.¹⁵⁹ Asbestos is not the kind of product someone freely chooses to use, such as a motorcycle or the rabies vaccine. Most people were exposed to asbestos in occupational settings.¹⁶⁰

156. *Brown v. Sears, Roebuck & Co.*, 514 So.2d 439 (La. 1987). Finding that "a multitude of children have been injured on escalators," *id.* at 442, the court held "that escalators, for all their utility, are unreasonably dangerous to small children." *Id.* at 444. Plaintiff did not prove that an alternative design was available, and the case could not be forced into the failure-to-warn mold: the escalator had a sign that said, "caution, hold handrail, attend children, avoid sides," and pictograms that showed a woman riding an escalator with one hand on the handrail and the other holding a child's hand, and depicted zones of danger where the sides and treads of the escalator come together. *Id.* at 441. The mother saw and heeded the warnings. She was as attentive as possible and held her small child's hand throughout the ride. Nevertheless, the child poked a finger on his free hand into a space on the side of the escalator and was seriously injured. Because "the exploring fingers of small children are a normal and foreseeable event," *id.* at 441, the only way to prevent these accidents is to have adults with small children use stairs or elevators. The court believed, however, that for marketing reasons department stores encourage all patrons to ride escalators.

157. SAMUEL S. EPSTEIN, *THE POLITICS OF CANCER* 83 (1978).

158. *Model for Asbestos Settlements*, A.B.A. J., April 1993, at 22.

159. The pervasive use of asbestos, however, delayed the development of substitutes, and there has, at least in the past, been concern about the safety of fiberglass. See SAMUEL S. EPSTEIN ET AL., *HAZARDOUS WASTE IN AMERICA* 368-69 (1982); Epstein, *supra* note 157, at 97, 100.

160. About 27 million people have been employed in the mining, milling,

George Coffman was a typical victim.¹⁶¹ From 1951 until 1969, Coffman was an electrician at the Philadelphia Naval Shipyard.¹⁶² He worked aboard warships, including submarines, frequently in cramped quarters with little ventilation.¹⁶³ While he was on these vessels, other workers were often ripping out or installing asbestos insulation on pipes and boilers throughout the ship, and asbestos dust permeated the environment.¹⁶⁴ In 1985, Coffman learned he was suffering from asbestosis. His physicians informed him that x-rays revealed asbestos fibers and scars in both of his lungs, and they told him he needed annual medical exams to see whether lung cancer was developing.¹⁶⁵ Thereafter, Coffman—who had already watched a brother-in-law die from asbestos-induced cancer—lived in constant fear.¹⁶⁶

Coffman brought an action against the companies that produced or distributed the asbestos products that were installed on ships on which he worked.¹⁶⁷ Coffman based his claim on a failure-to-warn theory. The court explained this theory as follows:

Here, the alleged defect is not the asbestos product itself, exposure to which medically caused injuries, but the failure to provide warnings. As a result, plaintiff was required to prove an element of proximate causation, that the absence of a warning was a proximate cause of harm.¹⁶⁸

Failure-to-warn has been the standard theory in asbestos cases, but it distorts the way asbestos cases are analyzed. George Coffman never purchased—or even worked with—asbestos, and no one could reasonably expect a warning to reach someone like him. It was not only electricians, like Coffman, who would not see warnings. Asbestos was unpacked at dockside and the boxes were never taken aboard ship; thus, most of the shipboard workers—even insulators and others who worked directly with asbestos—could not be expected to see container warnings either. The court worked its way around this by holding that Coffman was entitled to a

manufacturing, processing or installation of asbestos products. Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill What it Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 159 (1984).

161. See *Coffman v. Keene Corp.*, Prod. Liab. Rep. (CCH) ¶ 13,399, at 41,580 (N.J. Super. Ct. June 18, 1992).

162. *Id.* at 41,581.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 41,582.

rebuttable presumption that he would have seen and heeded an adequate warning,¹⁶⁹ and other courts have made similar holdings, both in cases involving asbestos¹⁷⁰ and other products.¹⁷¹ The problem with this analysis, however, is that it does not comport with reality. The evidence rather clearly demonstrates that warnings make little difference in the work place.

The nation's largest asbestos producer, The Johns-Manville Corporation, put warnings on all of its cardboard boxes beginning in 1964, and other major companies followed suit in 1966.¹⁷² Notwithstanding the court's presumption that George Coffman would have heeded a warning had it been given, the fact is that Coffman continued in his job until 1969¹⁷³—years after warnings were actually given. While Coffman may never himself have seen a warning on the asbestos boxes, there can be little doubt that he learned about them. There was a lot of talk about asbestos and illness even before warnings appeared on the product. Word got around the grapevine, particularly in union circles.¹⁷⁴ Yet there was no mass exodus from shipyards and other work places where asbestos was in use after warnings appeared in 1964 and 1966.¹⁷⁵ Nor did most workers begin to wear

169. *Id.* at 41,583.

170. *E.g.*, *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 342 (5th Cir. 1982); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1093 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

171. *E.g.*, *Reyes v. Wyeth Labs.*, 498 F.2d 1264, (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

172. *Borel*, 493 F.2d at 1104. The warnings read:

This product contains asbestos fiber.

Inhalation of asbestos in excessive quantities over long periods of time may be harmful.

If dust is created when this product is handled, avoid breathing the dust.

If adequate ventilation control is not possible wear respirators approved by the U.S. Bureau of Mines for pneumoconiosis producing dusts.

Id.

173. *Coffman*, Prod. Liab. Rep. (CCH) at 41,581.

174. *See* PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT* 30-31, 46-47 (1985).

175. Any perusal of the cases makes this clear. George Coffman continued working "in the asbestos-laden environment" at the Philadelphia Naval Shipyard until his retirement in 1969. *Coffman*, Prod. Liab. Rep. (CCH) at 41,581. William Taylor worked continuously at the New York Shipyard and the Philadelphia Navy Shipyard from 1945 to his retirement in 1984. *Taylor v. Celotex Corp.*, 574 A.2d 1084, 1086 n.1 (Pa. Super. Ct. 1990). Russel Migues worked as an insulator at Texaco, Inc., where he was required to cut asbestos products, from 1944 to 1977, when he was diagnosed with mesothelioma. *Migues v. Fibreboard Corp.*, 662 F.2d 1182, 1183 (5th Cir. 1982). These workers were typical.

respirators. They simply continued at risk until the 1970s when the shipyards stopped buying asbestos.¹⁷⁶

Why didn't workers act on the warnings? One reason, surely, is the inherent compulsion of the work place. Workers do what they are told or risk their jobs. Many are reluctant to question or complain. Workers, therefore, often take risks they would rather avoid.¹⁷⁷ Cognitive dissonance sets in. The thought of confronting management or quitting the job creates anxiety, as does continuing to expose oneself to risk. It is more comfortable to persuade oneself that, "it can't be that dangerous or they wouldn't let us work with this stuff."¹⁷⁸ Courts have recognized this reality when workers have been injured while working with dangerous machinery.¹⁷⁹ One court stated that, "[i]t could never be said as a matter of law that a workman whose job requires him to expose himself to danger, voluntarily and unreasonably encounters the same."¹⁸⁰

There is, moreover, an even larger class of potential victims for whom warnings are wholly irrelevant: the general public.¹⁸¹ Asbestos not only had specialized uses such as insulating warships. It was used so promiscuously that the average citizen became surrounded by it; it was used

176. See *Anderson v. Owens-Corning Fiberglass Corp.*, 810 P.2d 549 (Cal. 1991). OSHA first set limits on asbestos in the work place in 1972. As a result of heavy industry pressure, however, the standards were lax, permitting twenty times the exposure level recommended by the National Institute for Occupational Safety and Health. EPSTEIN, *THE POLITICS OF CANCER*, *supra* note 157, at 87-92. It was not until 1989 that EPA tried, unsuccessfully, to ban the importation, production or use of asbestos. *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

177. See, e.g., *W. KIP VISCUSI, FATAL TRADEOFFS* 6 (1992).

178. *They* vaguely represents those in control, including government, the employer, and the manufacturer. The idea that people in authority would not allow an extremely dangerous product to be used may be dismissed as naive—or considered to be a normative standard that the law should reflect.

179. See, e.g., *Rhoads v. Service Mach. Co.*, 329 F. Supp. 367, 381 (E.D. Ark. 1971); *McCalla v. Harnischfeger Corp.*, 521 A.2d 851, 856 (N.J. Super. 1987); *Johnson v. Clark Equip. Co.*, 547 P.2d 132, 140-41 (Or. 1976).

180. *Brown v. Quick Mix Co.*, 454 P.2d 205, 208 (Wash. 1969). Assumption of the risk, which is defined as "voluntarily and unreasonably proceeding to encounter a known danger," is generally recognized as a defense to products liability claim. *RESTATEMENT (SECOND) OF TORTS*, § 402A cmt. n (1964).

181. Long ago Twerski noted "that in some circumstances a warning will not have any effect on a class of foreseeable users and that even with a warning the product may be unreasonably dangerous." Aaron D. Twerski et al., *Use and Abuse of Warnings in Product Liability Litigation—Design Defect Litigation Comes of Age*, 61 *CORNELL L. REV.* 495, 506 (1976).

in hair dryers,¹⁸² cosmetic talc,¹⁸³ automobile brake linings,¹⁸⁴ all types of buildings—homes,¹⁸⁵ schools,¹⁸⁶ commercial buildings,¹⁸⁷ and even in children's toys.¹⁸⁸ High concentrations of asbestos fibers have been found in the air near construction sites where asbestos was being applied,¹⁸⁹ and because asbestos fibers are indestructible,¹⁹⁰ they are just as deadly when these buildings are eventually renovated or demolished, which in some occasions inevitably leads to billions of fibers being released into the air.¹⁹¹ Even minimal exposure may lead to mesothelioma, an invariably fatal form of cancer that many experts believe is caused only by asbestos.¹⁹² Mesothelioma victims have included family members of asbestos workers (who apparently were exposed to fibers brought into the home on the asbestos worker's clothes),¹⁹³ people living near asbestos mines and factories (where asbestos fibers are wind-borne),¹⁹⁴ garage mechanics (who, it is believed,

182. *Hair Dryers*, U.S. NEWS & WORLD RPT., April 9, 1979, at 72.

183. EPSTEIN, *supra* note 157, at 96.

184. EPSTEIN, *supra* note 157, at 96.

185. One survey found asbestos in nearly 30% of homes in the Eastern United States. In the South and West, home heating and air conditioning ducts were often made from asbestos. BRODEUR, *supra* note 174, at 342.

186. At least 733,000 public and commercial buildings contain asbestos. B.T. Mossman et al., *Asbestos: Scientific Developments and Implications for Public Policy*, 247 SCIENCE 294, 294 (Jan. 1994).

187. Mossman et al., *supra* note 186, at 294.

188. BRODEUR, *supra* note 174, at 123.

189. EPSTEIN, *supra* note 157, at 96.

190. EPSTEIN ET AL., *supra* note 159, at 30.

191. Asbestos can be safely removed, but it is a task that requires special care and extra expense. In a perfect world, every demolition or renovation might be done by conscientious, competent contractors, but we live in an imperfect world where, through mistake, ignorance, or a desire to save money, some buildings are demolished without proper precautions. See BRODEUR, *supra* note 174, at 337.

192. Mesothelioma is relatively rare, but it is an especially frightening disease for two reasons: it is a terribly painful and always fatal form of cancer (generally of the lung but sometimes of the stomach); and in at least some circumstances it has not appeared to be dose-related, putting people with even a small level of exposure to asbestos at risk. The type of asbestos may make a difference in this regard, however. The latest data suggests that amphibole asbestos presents the greatest danger and that relatively low levels of exposure to chrysotile asbestos does not cause mesothelioma. In most instances, the asbestos used in buildings is of the chrysotile variety. Mossman et al., *supra* note 186, at 294-95, 298-99. See also *Migues*, 662 F.2d at 1185 (noting that defendants, fourteen asbestos manufacturers, did not challenge the proposition that asbestos is the only known cause of mesothelioma).

193. Mossman et al., *supra* note 186, at 294-95, 298-99.

194. Mossman et al., *supra* note 186, at 294-95, 298-99.

were exposed from brake linings),¹⁹⁵ and people with no known link to asbestos (who may have simply inhaled asbestos fibers while walking down the street).¹⁹⁶

In asbestos cases, therefore, legal doctrine has not meshed with reality; warnings have been the linchpin of doctrine while in the real world they have meant little. This has produced a great deal of muddled thinking. In the first major asbestos decision, *Borel v. Fibreboard Paper Products Corp.*,¹⁹⁷ the jury found defendants were not negligent for failing to warn of foreseeable dangers but that their product was unreasonably dangerous because it did not contain warnings.¹⁹⁸ Any attempt to reconcile these two findings fails in light of the court's instruction that even for strict liability purposes, defendants only had a duty to warn of foreseeable dangers.¹⁹⁹ The jury was not asked to decide whether, if warned, Borel would have stopped working with asbestos, although the court held its verdict "necessarily included a finding that, had adequate warnings been provided, Borel would have chosen to avoid the danger."²⁰⁰ Yet, like electrician George Coffman and other asbestos workers, Clarence Borel continued to work as an asbestos insulator until he became ill in 1969, several years after warnings were given.²⁰¹ Citing *Borel*, courts held that asbestos was unreasonably dangerous as a matter of law and that defendants were collaterally estopped from relitigating that issue, only eventually to be reversed because the *Borel* jury never determined when a duty to warn first arose or whether the warnings that were given were adequate.²⁰²

195. BRODEUR, *supra* note 174, at 342.

196. Twenty to thirty percent of mesothelioma victims fall into this category. Mossman et al., *supra* note 186, at 295.

197. 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

198. *Id.* at 1093-94.

199. *Id.*

200. *Id.* at 1093.

201. *Id.* at 1081. See also BRODEUR, *supra* note 174, at 39-40.

202. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353 (E.D. Tex. 1981) (applying collateral estoppel), *rev'd*, 681 F.2d 334, 344-45 (5th Cir. 1982) (holding that "it is impossible to determine what the *Borel* jury decided about *when* a duty to warn attached," and noting that "although some asbestos products used by plaintiff Borel contained warnings, there was sufficient evidence that the warnings were inadequate"); *Migues*, 662 F.2d at 1183 (holding that "the District Court may have thought that *Borel* stands for the proposition that all asbestos products are unreasonably dangerous as a matter of law, but upon reviewing *Borel*, we must conclude that there is no such *decisis* in *Borel* to *stare*"), *rev'g in part* 493 F. Supp. 61 (E.D. Tex. 1981); *Flatt v. Johns Manville Sales Corp.*, 488 F. Supp. 836, 841 (E.D. Tex. 1980) (holding that "as a matter of law products containing asbestos are defective and unreasonably dangerous within the meaning of section 402A of the Restatement").

Only the legally-trained mind can get this confused. The jury probably had a simpler vision of the case. The lawyers may have argued that it was a lack of warnings that made asbestos unreasonably dangerous, but in all likelihood the jurors thought asbestos unreasonably dangerous because it makes people ill. Moreover, they almost certainly understood that given the realities of the world a warning probably would not have saved Clarence Borel.²⁰³ The most plausible explanation for the inconsistent verdicts is that the jury could make an award for plaintiff only by determining that asbestos was unreasonably dangerous *for failure to give warnings*. Had the jury been given the alternative of deciding that asbestos was unreasonably dangerous because the risks it imposed on society-at-large exceeded its benefits—irrespective of warnings—one suspects they would have done so.

Courts would have taken the better route in asbestos cases if they had instead adopted the formulation that Page Keeton set forth in his 1969 *Syracuse Law Review* article,²⁰⁴ under which juries would have been instructed that they could find that asbestos products were "unreasonably dangerous" if a reasonable person, with knowledge of its condition and appreciation of its risks, would not have marketed it, even with warnings.

In 1989, the Supreme Court of Louisiana tried to straighten this out. In the case of *Halphen v. Johns-Manville Sales Corp.*, it held:

A product is unreasonably dangerous per se if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product. . . . A warning or other feature actually incorporated in the product when it leaves the manufacturer's control, however, may reduce the danger-in-fact.²⁰⁵

The *Halphen* court did not invent new doctrine; it adopted a formulation that Page Keeton, among others,²⁰⁶ had articulated long before. But it had

203. Indeed, the jury heard evidence that suggested that Borel knew he was running risks. He testified that he knew that asbestos dust "was bad for me" and that there was talk at the union hall about just how bad it was. Some workers believed inhaling asbestos might lead to tuberculosis; others said it dissolved safely in the lungs. "There was always a question, you just never know how dangerous it was," he said. As previously noted, *supra* note 172, in the later years asbestos containers did, in fact, contain warnings. Moreover, Borel knew that, at least on some jobs, the employer made respirators available; Borel apparently tried them because he testified that he did not use them because they were uncomfortable and made it breathing difficult, particularly in hot weather. *Borel*, 493 F.2d at 1082, 1104-05.

204. See *supra* note 148 and accompanying text.

205. *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110, 114 (La. 1986) (citation omitted).

206. See, e.g., *supra* note 33.

the benefit of experience—indeed, experience gained through the experimentation of fifty-three American jurisdictions over two decades. *Halphen* recognized that the concept of "defect" cannot provide the single, unifying principle of products liability law.²⁰⁷ Some products impose undue risks on society-at-large despite the best possible design, construction, and warnings. There are, therefore, instances when strict liability should apply to an entire product category.

Halphen offered a framework for analyzing asbestos cases that would have been fairer to both plaintiffs and defendants. Classifying these actions as failure-to-warn cases worked an injustice to plaintiffs because it forced them to recite the mantra that they never saw warnings and were not aware of the danger, even though that was, at best, stretching the truth. At the same time, the failure-to-warn model was unfair to defendants because it robbed them of the opportunity to argue that, at least in some circumstances, asbestos was *reasonably* dangerous. For example, defendants might have argued along the following lines: It was essential that warships be insulated with asbestos during World War II. These vessels were to sail into battle and many of them would be hit by enemy gunfire, bombs and torpedoes. They had to be insulated as well as possible, and at that time no insulator was as effective as asbestos.²⁰⁸ Although civilian workers were subjected to risk from working with asbestos, any alternative would have put American sailors—and the nation itself—at even graver risk.²⁰⁹ This argument raises difficult questions, to be sure, but it is a truer presentation of the real issues.

We shall never know how *Halphen* would have fared over time, how it would have affected the evolution of common law decisions in asbestos cases, whether it would have had an even broader impact in the field of products liability generally. Any such prospects were rapidly crushed by the tort reform juggernaut. In 1988, the state enacted a statute²¹⁰ that effectively abolished product category liability. That Act confines Louisiana to three arbitrary compartments—unreasonably dangerous in construction,²¹¹ or in

207. Henderson and Twerski argue precisely the opposite. "[D]efect," they maintain, "is the conceptual linchpin that holds products liability law together." *Closing the Frontier*, *supra* note 46, at 1267.

208. *See supra* note 159.

209. Using asbestos safely—which requires wearing cumbersome equipment and sealing off work areas—would arguably have been too slow a process during wartime.

210. The Louisiana Products Liability Act, LA. REV. STAT. ANN. §§ 9:2800.51-9:2800.59 (West 1988). The Act was specifically intended to overrule *Halphen* in a number of respects. *See Miles v. Olin Corp.*, 922 F.2d 1221, 1224 (5th Cir. 1991); *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 181-82 (5th Cir. 1990).

211. LA. REV. STAT. ANN. § 9:2800.55 (West 1988).

design,²¹² or on account of an inadequate warning.²¹³ Under this statute, a design defect claim cannot be brought unless plaintiff can show that an alternative design exists²¹⁴ and the costs of the alternative would be less than the harm that will result from use of original design.²¹⁵ Asbestos cases cannot fit this into this compartment since asbestos cannot be made safe through redesign. Along with their counterparts in other states, therefore, parties in Louisiana must once again engage in the pretense that asbestos cases are about warnings.²¹⁶

C. Tobacco

When scholars think about generic liability, they often think first about cigarettes.²¹⁷ The drafters of section 402A thought about it²¹⁸ and wrote in comment i: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous."²¹⁹

212. *Id.* § 2800.56.

213. *Id.* § 2800.57.

214. *Id.* § 2800.56(1).

215. *Id.* § 2800.56(2). This essentially adopts Judge Learned Hand's famous negligence formula ($B < PL$), set forth in *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

216. Under the Louisiana statute, a manufacturer is not liable for failure-to-warn unless he "failed to use reasonable care to provide an adequate warning." LA. REV. STAT. ANN. § 9:2800.57 (West 1988). This is a nearly pure negligence standard. An asbestos manufacturer might successfully defend a claim under this section if he did whatever he reasonably could do to warn potential users and handlers, even if he knew that warnings would be futile. Under a theory of strict liability, a manufacturer would be liable if his product did not contain an *adequate* warning, regardless of whether he did his best.

217. For the thinking of one of the founders of products liability on the subject, see Fleming James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54 CAL. L. REV. 1550, 1552-54 (1966).

This article uses the terms cigarettes and tobacco interchangeably since cigarettes comprise 95% of the U.S. tobacco market. DAVID KROGH, SMOKING: THE ARTIFICIAL PASSION 11 (1991).

218. Surely, one of the most sensitive questions at the time was whether and how § 402A would affect tobacco litigation. Within the preceding few years, a handful of plaintiffs had unsuccessfully tried to hold cigarette companies liable on negligence and breach of warranty theories. See Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897, 899 n.2 (1988).

219. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1964).

One cannot read this statement today and not be amused. There is, first, an endearing naivete. Middle-aged men wrote these words in 1964, just before the era of hippies and drugs. Where did they even get the idea that marijuana was smoked with tobacco? One can only guess that they heard about "marijuana cigarettes" and thought this meant people blended marijuana with tobacco. Although they do not say it in so many words, their example seems to be premised on the idea of a consumer unknowingly winding up with a cigarette containing marijuana. Did the drafters think that a drug dealer might secretly impregnate cigarettes with marijuana to turn smokers into drug addicts? How ironic, as it turns out, that big league drug dealers were in fact cramming a substance into cigarettes to build an addicted cliental—and that this substance was not marijuana but tobacco.

We know now that nicotine is powerfully addictive—so addictive, in fact, that when patients in drug treatment facilities are asked what drug they need most, the vast majority list tobacco first, ahead of heroin, methadone, alcohol, and the other drugs that brought them into the program.²²⁰ Researchers now tell us that "people smoke primarily to get nicotine into their bodies"²²¹—something major cigarette companies have secretly known since at least 1962²²²—and medical authorities call nicotine addiction "the world's number one public health enemy."²²³ We know that smoking causes about

220. KROGH, *supra* note 217, at 93-94. Even the financial community has become aware of the addictiveness of cigarettes—and some financiers find that attractive. Warren Buffett, who is considered one of the nation's most savvy investors, is quoted as having said: "I'll tell you why I like the cigarette business. . . . It costs a penny to make. Sell it for a dollar. It's addictive. And there's fantastic brand loyalty." BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* 218 (1990).

221. KROGH, *supra* note 217, at 4-5.

222. In 1994, the *New York Times* obtained minutes of an internal company meeting held in England in July 1962 among key officials of Brown & Williamson and its parent company, British-American Tobacco PLC ("Batco"). The transcript makes it quite clear that the that nicotine was considered a drug—a "remarkable, beneficent drug that both helps the body to resist external stress and also can as a result show a pronounced tranquilizing effect," according to Sir Charles Ellis, the companies' chief researcher. Philip J. Hilts, *Cigarette Makers Debated the Risks They Denied*, N.Y. TIMES, June 16, 1994, at A1. At another internal meeting in 1967, Dr. Ellis stressed that Batco's real business was not tobacco but nicotine. Philip J. Hilts, *Tobacco Maker Studied Risk But Did Little About Results*, N.Y. TIMES, June 17, 1994, at A1. In 1983, the Philip Morris Company forced one its researchers to withdraw a paper that had been accepted for publication by the journal *Psychopharmacology*, which reported that, based on research with rats, nicotine was addictive.

223. William G. Cahan, M.D., *Forward* to DAVID KROGH, *SMOKING: THE ARTIFICIAL PASSION*, *supra* note 217, at ix.

one-third of all cancer in the United States, including ninety percent of all lung cancer;²²⁴ that smokers have far greater risks of dying of heart disease than do nonsmokers;²²⁵ that smoking is the primary cause of chronic obstructive lung diseases such as chronic bronchitis and emphysema;²²⁶ that a mother's smoking may be worse for a fetus than cocaine use;²²⁷ and that every day 1,000 Americans die as a result of smoking.²²⁸ The phrase "good tobacco" is an oxymoron.

The drafters focused on the consumer's expectations by saying that strict liability would not attach to pure tobacco but would attach to adulterated tobacco. Comment i states that a product is not unreasonably dangerous unless it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."²²⁹ In the drafters' minds, someone who chose to smoke assumed the risks of doing so, or at least whatever risks were generally known. He decided to take the risks and should not be heard to complain when they have turned out badly. The drafters were trying to honor the core values of personal choice and personal responsibility, but it is better to mediate those values through the assumption of risk defense than by giving a strained meaning to the phrase "unreasonably dangerous."

Consider the following hypothetical: Plaintiff sues a cigarette manufacturer, contending that he contracted leukemia as a result of smoking its cigarettes. Plaintiff does not argue that his illness was caused by tobacco per se; he contends it results from a pesticide sprayed on defendant's tobacco crop. Plaintiff presents reliable evidence establishing that defendant's cigarettes contain residues of this pesticide, and that being exposed to the pesticide in this way triples one's chance of developing a fatal leukemia. Are defendant's cigarettes to be considered unreasonably dangerous because they increase one's risk of dying of leukemia by a factor of three, while uncontaminated cigarettes are not to be unreasonably dangerous even though, *inter alia*, they increase one's chances of dying of lung cancer more than ten fold? In an actual case, the court dismissed a claim that plaintiff's husband died as a result of smoking cigarettes that contained pesticides because plaintiff had alleged that *all* cigarettes contained such substances.²³⁰ The

224. Robert S. Boyd, *Twenty-Three Years Later, War on Cancer is Far from Won*, PHILADELPHIA INQUIRER, Sept. 3, 1994, at A1.

225. Cass R. Sunstein, Book Review, NEW REPUBLIC, Feb. 15, 1993, at 36.

226. See Ausness, *supra* note 218, at 905.

227. Paul Cotton, *Smoking Cigarettes May Do Developing Fetus More Harm Than Ingesting Cocaine, Some Experts Say*, 271 J.A.M.A. 576 (1994).

228. KROGH, *supra* note 217, at xiv.

229. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1964).

230. See *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 230 (N.D. Ohio).

court held that plaintiff was "essentially claiming that cigarettes generically are defective," but pursuant to the Ohio tort reform statute a product may only be deemed to be defective if it deviates from identical units produced by the manufacturer.²³¹

This, of course, analyzes the case within Abinger's Paradigm, under which the concept of defect is preferred to that of unreasonable danger. But does it make sense to impose liability on a manufacturer who places a few people at risk, by selling one lot of cigarettes that were inadvertently contaminated with a pesticide, for example, and not impose liability on manufacturers who knowingly place millions of people at risk, by selling cigarettes that are uniformly treated with the pesticide? And does it make sense to impose liability on cigarettes contaminated with a pesticide and not impose liability on cigarettes generically if, for example, the greater share of the hazard comes from the tobacco rather than the pesticide?

Under Cardozo's Paradigm, liability depends not upon whether cigarettes are defective but whether they are unreasonably dangerous. Do cigarettes fail a risk-utility test? The answer unequivocally must be yes. This is not to say that cigarettes have no utility. Nicotine has some rather attractive benefits. It is a psychoactive drug that moderates the user's attentional state.²³² As David Krogh has put it, people use amphetamines to get high, Quaaludes to get low, and nicotine to get medium.²³³ Nicotine relieves boredom and calms stress.²³⁴ Unlike intoxicants such as marijuana or alcohol, nicotine helps the user persevere at work.²³⁵ When people work long hours, both their performance and mood deteriorate.²³⁶ They become not only more fatigued but more aggressive. Not only does their concentration fall off; so does their social warmth and their ability to relate to others.²³⁷ Nicotine does not directly help performance, but it does significantly ameliorate the deterioration in mood.²³⁸ In fact, workers who are not restricted from smoking on the job smoke more than half of all of their cigarettes at work,

1993).

231. *Id.* See also *Kotler v. American Tobacco Co.*, 731 F. Supp. 50 (D. Mass. 1990) (dismissing a similar claim because plaintiff's own experts testified that the decedent death was caused by tobacco itself and there was no evidence implicating the toxic pesticide DDVP that defendant dusted on its tobacco crop).

232. KROGH, *supra* note 217, at 20, 53.

233. KROGH, *supra* note 217, at 53.

234. KROGH, *supra* note 217, at 53.

235. KROGH, *supra* note 217, at 44.

236. KROGH, *supra* note 217, at 40-41.

237. KROGH, *supra* note 217, at 40-41.

238. KROGH, *supra* note 217, at 40-41.

particularly during the afternoon.²³⁹ Despite these benefits, and others involving taste or image, the health risks of smoking are so great that a reasonable person would deem them to be unreasonably dangerous.²⁴⁰

That does not necessarily mean that cigarette manufacturers should be strictly liable to smokers who contract tobacco-related diseases. Notwithstanding the judgment of the hypothetical reasonable person, people do choose to smoke. If it is their choice, should it not be their responsibility? This issue can be addressed in a straightforward manner by the assumption of risk defense. If assumption of the risk is to be an absolute defense in products liability actions, then someone who voluntarily and unreasonably proceeds to encounter a known danger cannot prevail against the seller even though a product fails a risk-utility test and is subject to strict liability. With respect to cigarettes, an assumption of risk defense would bar actions by people who chose to smoke²⁴¹ but not victims of second-hand smoke.²⁴² The assumption of risk defense is also the best mechanism for analyzing whether smokers should be able to recover when defendant's tobacco was contaminated with a pesticide. One might conclude that the smoker assumed the risk of contracting cancer from smoking, that the presence of the pesticide had only a negligible effect of that risk, and, therefore, the claim should be barred; or one might reach the opposite result by concluding that the smoker assumed only the risks of smoking "good tobacco." Either way, the assumption of risk defense focuses the analysis on the real issue, which involves the principle that the individual should bear the consequences of his own actions.

There is, however, another dimension to the question of personal responsibility. In virtually all instances, the smoker does *not* bear the financial

239. KROGH, *supra* note 217, at 40-41.

240. Not everyone agrees. In dismissing a risk-utility claim in a products liability case, one judge wrote: "[I]s purely hedonistic consumer preference for a product to be considered a component of 'utility'? If not, a very large percentage of our manufactured products will end up on the proscribed list." *Kotler*, 731 F. Supp. at 53. Taking "hedonistic consumer preference" into account does not make risk-utility unworkable, however. While it may be impossible to quantify the pleasure consumers derive from a product, it is often possible to compare all of the pleasure that users derive against all of the pain and suffering caused by that product, and to make a sensible determination of which is greater.

241. This can be a complicated question in smoking cases. As one commentator has put it: "While the decision to begin smoking may be voluntary, however, the addictive nature of tobacco causes many smokers to continue smoking when they would rather stop." Ausness, *supra* note 218, at 955. It has been reported that three out of four smokers have tried to quit and failed. *Id.* at n.404.

242. The E.P.A. estimates that second-hand smoke results in 3,000 deaths annually from lung cancer alone. See Philip J. Hilts, *U.S. Issues Guidelines to Protect Nonsmokers*, N.Y. TIMES, July 22, 1993, at A14.

burden of her choice; the medical reimbursement system shifts that burden to society-at-large. If the smoker has private medical insurance, the costs will be spread among all the policy holders; if not, the costs will be forced upon the taxpayers through the Medicare or Medicaid systems. These costs run into the tens of billions of dollars annually.²⁴³ The real question is whether the costs of tobacco-related diseases should be borne by those who benefit from tobacco or by society-at-large, and there is strong sentiment that tobacco companies and smokers should bear those costs.²⁴⁴ Indeed, Mississippi recently filed a lawsuit against tobacco companies seeking reimbursement for the medical costs of treating smoking-related diseases, and Florida may soon file a similar action.²⁴⁵ In the early stages of the national debate over health care reform, several of the proposed bills would have subsidized national health insurance through increased cigarette excise taxes.²⁴⁶ The tobacco industry publicly greeted these proposals with some flippancy. "You know, I don't really care about the excise tax at all," one tobacco company executive has been quoted as saying.²⁴⁷ "I wouldn't mind making the Government a little more dependent on the habit."²⁴⁸ Nevertheless, the proposals for

243. See Ausness, *supra* note 218, at 905-06, 943. The Department of Health and Human Services estimated the combined costs of medical expenses and lost work time at \$52 billion annually. Philip J. Hilts, *Smoking's Cost to Society is \$52 Billion a Year, Federal Study Says*, N.Y. TIMES, Feb. 21, 1990, at A18.

244. See, e.g., Ausness, *supra* note 218, at 969 (concluding that smoking-related injuries should be borne directly or indirectly by smokers than the general public); and Saffire, *supra* note 139.

245. Tim Nickens, *Tobacco Lawsuit is Up to Chiles*, N.Y. TIMES, Dec. 19, 1994, at B1 (reporting that the Florida legislature enacted legislation authorizing such an action but that Governor Chiles has not yet made a final decision to file the lawsuit); *State Suit on Tobacco Goes to Mississippi Court*, WASH. POST, Dec. 19, 1994, at A10 (reporting that the Mississippi state trial court will soon rule on whether Mississippi may proceed with its action).

246. The federal tax on cigarettes is currently 25 cents per pack. This tax would have been increased by 74 cents a pack under President Clinton's plan, by about \$1.24 a pack under Senator Kennedy's plan, and by \$1.75 under Senator Moynihan's plan. Adam Clymer, *Health Legislation Advances in Senate Two Committees Take Steps on Proposals*, N.Y. TIMES, June 10, 1994, at A1. Indeed, if there were no decrease in sales, Senators Kennedy and Moynihan's plans would collect more taxes than necessary to subsidize medical costs of smoking-related diseases. It has been estimated that a tax of 73 cents per pack is required for that purpose. Ausness, *supra* note 218, at 943.

247. See Roger Rosenblatt, *How Do Tobacco Executives Live With Themselves?*, N.Y. TIMES MAGAZINE, March 20, 1994, at 37.

248. *Id.*

substantially increasing cigarettes taxes were among the first casualties of industry lobbying.²⁴⁹

As of this writing, no one has ever recovered a penny in a products liability action against a cigarette company.²⁵⁰ The plaintiff who came closest was Antonio Cipollone. Antonio's wife, Rose Cipollone, began smoking in 1942, at the age of seventeen, because she thought it was "glamorous."²⁵¹ With the only exception of a time during her first pregnancy when she reduced her smoking, Rose Cipollone smoked between one to two packs a day for more than thirty-eight years.²⁵² In 1981, she learned she had lung cancer; her doctors told her to stop smoking, but she found it impossible to quit.²⁵³ She continued to smoke secretly even after her lung was removed in 1982. Only when she was in a terminally ill state did she finally stop smoking.²⁵⁴ She died in 1984.²⁵⁵

In the year before Rose died, the Cipollones filed a products liability case against the manufacturers of the cigarettes Rose had smoked, and in 1988 their case came to trial.²⁵⁶ The jury's sympathy for Rose Cipollone was limited. It found that she "voluntarily and unreasonably encounter[ed] a known danger by smoking cigarettes," held her eighty percent responsible for her own injuries and—in accordance with the New Jersey comparative fault law which bars recoveries by plaintiffs more than fifty percent at fault—awarded her nothing.²⁵⁷ But it awarded Antonio Cipollone \$400,000 on his own claim for harm that he suffered as a result of his wife's illness and death.²⁵⁸ Both sides appealed.

Antonio Cipollone had proceeded under all possible theories, including failure to warn, breach of warranty, misrepresentation and conspiracy to defraud. The jury found in his favor on the failure to warn and breach of warranty claims, and in defendants' favor on the two intentional torts,

249. Neil A. Lewis, *Gains for Tobacco in Health Care Fight*, N.Y. TIMES, June 25, 1994, at 9.

250. See Mark Hansen, *To Lawyer's Surprise, Cancer Suit Lost*, A.B.A. J., Sept. 1993, at 40; Barbara Demick, *Criminal Probe on Tobacco*, PHILADELPHIA INQUIRER, June 7, 1993, at A1; Stephen Labaton, *Denting the Cigarette Industry's Legal Armor*, N.Y. TIMES, June 19, 1988, § 4 at 28.

251. See *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 548 (3d Cir. 1990), *rev'd in part, aff'd in part*, 112 S. Ct. 2608 (1992).

252. *Id.* at 551.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 553.

257. *Id.* at 554.

258. *Id.* at 546, 554.

fraudulent misrepresentation and conspiracy to defraud.²⁵⁹ He also had asserted a risk-utility claim, but the trial court dismissed it before trial.

When Antonio Cipollone filed his lawsuit in 1983, he was not the only plaintiff taking on the tobacco companies. The same lawyers representing the Cipollones also commenced two other actions against tobacco companies.²⁶⁰ One of these, *Haines v. Liggett Group, Inc.*,²⁶¹ was, along with *Cipollone*, filed in federal district court in New Jersey. The other, *Dewey v. R.J. Reynolds Tobacco Co.*,²⁶² was filed in New Jersey state court.

Lawsuits against tobacco companies were not new. Since 1954 they had faced hundreds of actions, and not lost a single one.²⁶³ But this group of cases represented a new threat. First, one of their strongest weapons had lost its potency. In the early cases, the tobacco companies skillfully argued that plaintiffs had not scientifically proven that their disease had been caused by smoking.²⁶⁴ This was a two-pronged argument: the tobacco companies were able to argue that plaintiff had not proved either that smoking caused the disease generally or that it caused the disease in plaintiff's own individual case. However, by the time of the *Cipollone*, *Haines*, and *Dewey* cases, the industry's causation arguments had lost much of their force. The portion of adult Americans who smoke had fallen significantly over the past several decades,²⁶⁵ and 94 percent of Americans now believed that "cigarettes are harmful to your health."²⁶⁶ It could be expected, therefore, that jurors now would be less receptive to defendants' questioning causation. At the same

259. *Id.* at 553-54.

260. The *Dewey* case was filed in 1982, the *Haines* case in 1984. Lead counsel for plaintiffs in all three cases were Marc Edell and Cynthia A. Walters of Budd Lerner Gross Rosenbaum Greenberg & Sade, P.C. in Short Hills, New Jersey. See *infra* notes 261-62.

261. 140 F.R.D. 681 (D.N.J. 1992).

262. 523 A.2d 712 (N.J. Super. Ct. Law Div. 1986), *modified*, 542 A.2d 919 (N.J. Super. Ct. App. Div. 1988), *aff'd in part, rev'd in part*, 577 A.2d 1239 (N.J. 1990).

263. See Douglas N. Jacobson, Note, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1021 n.1, 1022 n.7 (1989) (reporting that from 1954 until the *Cipollone* verdict was handed down in June 1988, 334 claims had been filed against tobacco companies and that, with the exception of cases involving foreign objects such as nails and fish hooks, "no claimant has received one cent in any tobacco liability suit").

264. *Id.* at 1022.

265. In 1954, 45% of adult Americans smoked cigarettes. LOUIS HARRIS, *INSIDE AMERICA* 103 (1987). This percentage has now fallen to 27%. Leslie McAneny, *Despite Growing Concerns, Most Non-smokers Oppose Stringent Bans*, GALLUP POLL MONTHLY, March 1994, at 21.

266. See McAneny, *supra* note 265, at 24. Indeed, today 78% of the public believes that second-hand smoke is harmful. *Id.*

time, statistical evidence was becoming a stronger weapon for plaintiffs. Epidemiological data were better; doctors were now able to testify, for example, that smokers develop lung cancer at rate 10.8 times that of non-smokers and that, therefore, it was more likely that smoking—rather than some other factor—was the cause of a particular plaintiff's disease.²⁶⁷ Moreover, this kind of statistical proof was gaining respectability among scholars and courts.²⁶⁸

A second reason why the tobacco companies were becoming more vulnerable had to do with the assumption of risk defense. Many jurisdictions adopted comparative fault in the 1970s and 1980s, and their courts often held that assumption of the risk was no longer an absolute defense in products liability actions.²⁶⁹ This was the rule in New Jersey, which permitted a plaintiff to recover so long as plaintiff's degree of fault was less than defendant's.²⁷⁰

The group of cases in New Jersey represented a particular threat; this was probably the perfect jurisdiction for plaintiffs to seek to beat the tobacco companies' winning streak. In a chain of cases beginning in 1978,²⁷¹ the New Jersey Supreme Court had consistently and vigorously mandated use of the risk-utility analysis in products liability actions—and although it did not use the term, the court clearly recognized product category liability. The court had held that strict liability attaches whenever a product "is not reasonably fit,

267. This could not generally be said for a smoker who died of heart disease, since smokers die of heart disease at rates not quite twice that of nonsmokers. But data show that smokers have 4.1 times the risk of dying of oral cancer, 5.4 times the risk of dying of cancer of the larynx, and 6.1 times greater chance of dying of bronchitis or emphysema than do nonsmokers. Sunstein, *supra* note 225, at 36.

268. The "weak version of preponderance rule"—which allows a plaintiff to establish the cause of her illness exclusively through statistical evidence of this kind—gained increased respectability in the early 1980's. See generally *In re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740, 835, [part B(b)(1)] (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

269. See, e.g., David A. Fischer, *Applicability of Comparative Negligence to Misuse and Assumption of Risk*, 43 MO. L. REV. 643 (1978); Henry Woods, *The Trend Toward Comparative Fault*, 7 J. PROD. LIAB. 399 (1984).

270. N.J. STAT. ANN. § 2A:15-5.1 (West Supp. 1985).

Even where assumption of risk remained a complete bar, an increasing awareness that nicotine is addictive was making it possible for some plaintiffs to argue that they had become addicted to cigarettes before either warning labels appeared on cigarette packaging or they, personally, learned about the hazards of smoking. Important research about the addictive qualities of nicotine was published in the early 1980's. See KROGH, *supra* note 217, at 78-79, 164-65.

271. The chain of decisions began with *Cepeda v. Cumberland Eng'g Co.*, 386 A.2d 816 (N.J. 1978).

suitable and safe for its intended use,²⁷² and that the risk-utility test was central to making that determination.²⁷³ "The theory," wrote the court, "is that only safe products should be marketed."²⁷⁴ It set forth two simple tests for determining whether a product is safe: "(1) does its utility outweigh its risks? and (2) if so, has that risk been reduced to the greatest extent possible consistent with the product's utility."²⁷⁵

When most parties face legal difficulties they may concentrate on marshalling their best evidence and their strongest legal arguments, but cigarette companies are not like most parties. They have revenues of about \$100 billion a year.²⁷⁶ One may appreciate the size of the tobacco companies, and the profitability of the cigarette business, by considering that although tobacco companies own enormous non-tobacco enterprises—including General Foods, Kraft, Post, Nabisco, Beech-Nut, Bulova, CNA, Miller, Oscar Mayer, Loews Hotels, to name only a few—most of their profits come from cigarettes.²⁷⁷ The New Jersey cases, therefore, posed a threat to powerful interests.

The tobacco industry reveals little about its lobbying activities,²⁷⁸ but sources in neighboring Pennsylvania reported that tobacco lobbyists were "going state to state" with two alternative strategies: to expressly exempt

272. *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 149 (N.J. 1979).

273. *Freund v. Cellofilm Properties, Inc.* 432 A.2d 925, 930 n.1 (N.J. 1981).

274. *Id.*

275. *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 545 (1982).

276. The five leading companies and their 1990 annual sales are: American Brands, Inc. (\$8.27 billion); Loews Corporation (\$12.3 billion); RJR Nabisco (\$13.9 billion); Philip Morris Companies, Inc. (\$44.3 billion); and B.A.T. Industries (\$20.6 billion). HOOVER'S HANDBOOK OF AMERICAN BUSINESS 1992, at 92, 346, 436, 463 (Gary Hoover et al. eds., 1991); and HOOVER'S HANDBOOK OF WORLD BUSINESS 1992, at 156 (Gary Hoover et al. eds., 1991) (reporting information for B.A.T. Industries).

277. American Brands and Philip Morris each derive between 68% and 69% of their operating income from tobacco; Loews Corporation derives 75% of its net income from cigarettes; and RJR Nabisco, Inc. derives 57% of total sales from tobacco. HOOVER'S HANDBOOK OF AMERICAN BUSINESS 1992, *supra* note 276, at 92, 346, 436, 463. B.A.T. Industries—a British-owned corporation that controls a significant portion of the U.S. cigarette market through its U.S. subsidiary, Brown & Williamson Tobacco Corp.—derives 69% of its operating income from tobacco even while operating the largest insurance company in England, the sixth largest insurance company in the U.S., and other substantial enterprises such as the Hardee's Restaurant chain. HOOVER'S HANDBOOK OF WORLD BUSINESS 1992, *supra* note 276, at 156.

278. It is, of course, known that tobacco companies spend large sums of money lobbying. See, e.g., Ian Fisher, *Philip Morris Tops List of Big Lobbying Spenders in New York*, N.Y. TIMES, March 16, 1994, at B2.

tobacco from the state's products liability law or "to destroy products liability" entirely.²⁷⁹ After the New Jersey cigarette cases²⁸⁰ were filed, and before any of them could reach trial, the New Jersey legislature passed a tort reform statute,²⁸¹ which preserved the risk-utility test but precluded strict liability whenever:

The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with ordinary knowledge common to the class of persons for whom the product is intended [except for industrial machinery].²⁸²

This statute dramatically changed New Jersey products liability law. The tort reform statute had the effect of immunizing any product from strict liability unless it failed *both* the risk-utility *and* consumer expectation tests.²⁸³ This effectively destroyed the body of law fashioned by the state courts which used only the risk-utility test.²⁸⁴

After passage of the New Jersey tort reform law, the tobacco companies sought to have the risk-utility claims dismissed in the pending cases. The statute, however, did not contain an express retroactivity provision. The general rule in New Jersey is that only statutes which codify the common law are presumed to be retroactive; thus, plaintiffs argued that tort reform statute

279. Jodi Enda, *Tobacco Lobby is Targeting Pa. on Liability Laws*, PHILADELPHIA INQUIRER, Sept. 26, 1990, at B1.

280. See *supra* notes 272-76.

281. New Jersey Products Liability Act, N.J. STAT. ANN. §§ 2A:58C-1 to 2A:58C-7 (West 1987).

282. *Id.* § 3a(2).

283. This contrasts with the approach developed by the California courts under which a plaintiff was permitted to recover under *either* the risk-utility *or* consumer expectation test. See *Barker v. Lull Eng'g Co.*, 573 P.2d 443 (Cal. 1978). Although California law gained wide respect among courts in other states, it was—needless to say—unpopular in corporate circles. It may not be a surprise, therefore, that in the same year that the New Jersey tort reform statute was enacted, tort reform legislation was enacted in California that accomplished both of the tobacco industry's goals: (1) as a general matter, it immunized from strict liability inherently unsafe products that the ordinary consumer knew to be unsafe; and (2) it specifically exempted tobacco. CAL. CIV. CODE § 1714.45(a)(1) & (2) (West 1987). With the ability to have legislation like this enacted, it is little wonder that bankers funding acquisitions of tobacco companies have concluded that tobacco litigation was "[n]ot a problem." BURROUGH & HELYAR, *supra* note 220, at 218.

284. See *supra* notes 272-76 and accompanying text.

changed common law while the tobacco companies argued it merely codified the common law.²⁸⁵ In January 1990, this issue reached the Third Circuit in the *Cipollone* case.²⁸⁶ The Third Circuit expressed the view that the statute did not codify common law, but nevertheless, based on statutory language, it held that the legislature had intended that the law apply retroactively.²⁸⁷ It ruled, however, that the jury must decide whether the ordinary consumer knew about the inherently dangerous characteristics of cigarettes when Rose Cipollone began smoking.²⁸⁸ It held that the district court had improperly dismissed Cipollone's risk-utility claim before trial and ordered that plaintiff be allowed to proceed with that claim on retrial.²⁸⁹

Later in the year, the same issue reached the New Jersey Supreme Court in the *Dewey* case.²⁹⁰ In arguing that the statute merely codified existing law, the tobacco companies noted that courts had generally followed section 402A of the Restatement and that comment i stated that "good tobacco" was not to be considered unreasonably dangerous.²⁹¹ The court would have none of it. It found that the statute "drastically changed the method of analyzing products-liability cases"²⁹² in New Jersey, adding: "The 'good tobacco' example included in comment i has never been adopted by this Court."²⁹³ It therefore refused to apply the statute retroactively to eliminate the risk-utility claim.²⁹⁴

The *Dewey* case was remanded for trial.²⁹⁵ Meanwhile, the *Cipollone* case reached the Supreme Court, which held that federal cigarette labelling law preempted only state law claims relating to the advertising or promotion of cigarettes, and that case too was remanded for a new trial.²⁹⁶ However, one of the tobacco companies' litigation weapons still remained very effective:

285. See *infra* notes 287, 292.

286. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *rev'd in part, aff'd in part*, 112 S. Ct. 2608 (1992).

287. *Id.* at 577-78.

288. *Id.* at 578, 583.

289. *Id.*

290. *Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239 (N.J. 1990).

291. *Id.* at 1253 [§ III].

292. *Id.* at 1252.

293. *Id.* at 1253.

294. *Id.* at 1255.

295. *Id.*

296. The risk-utility claim was glossed over by the Supreme Court. The majority opinion of the Court acknowledges that Count 2 of the Third Amended Complaint asserted design defect claims, one of which was based on the theory that "the social value of [defendants'] product was outweighed by the dangers it created." *Cipollone*, 112 S. Ct. at 2614 [§ I]. However, later in the opinion when the Court discusses each theory in turn, it inexplicably skips this claim. *Id.* at 2621-25 [§ V].

exhaustion. The *Cipollone* lawsuit outlived not only Rose Cipollone but also her husband, Antonio.²⁹⁷ Neither their son nor the lawyers handling the cases, who had expended more than \$5 million in time and \$1 million in out-of-pocket expenses in their cigarette litigation, wanted to continue the fight, and both the *Cipollone* and *Dewey* cases were discontinued.²⁹⁸ As of this writing *Haines*—the last remaining New Jersey case with a viable risk-utility claim—has recently been taken on by a new counsel for the plaintiff, after the original attorneys withdrew because the financial burden of the litigation had become too great.²⁹⁹

Despite the lobbying might of the tobacco industry, courts still occasionally apply generic risk-utility analysis to cigarette cases. In May 1993, a Mississippi trial court held that: "[C]igarettes are, as a matter of law, defective and unreasonably dangerous for human consumption. Cigarettes are defective because when used as intended, they cause cancer, emphysema, heart disease and other illnesses."³⁰⁰ Moreover, the court struck defenses based on assumption of risk and comparative negligence, holding that under Mississippi law the assumption of risk only applies when plaintiff's negligence is the sole proximate cause of the injury and contributory negligence only applies when plaintiff misused the product.³⁰¹ This left only two issues for the jury to decide: causation and damages.³⁰² Just when it looked as if a cigarette company had been knocked to the mat, the jury surprised everyone by finding that the fatal blood clot in plaintiff's lungs resulted from urinary tract infections rather than from lung cancer, and defendants prevailed yet again.³⁰³ This verdict, however, may represent a form of jury nullification. It is more likely that, the court's instructions notwithstanding, the jury decided that plaintiff's claim should be barred by his own assumption of risk than it is that they were persuaded that lung tumors resulted not from lung cancer but from a urinary tract infection.

The tobacco companies now face a new threat, one that is potentially potent because the assumption of risk defense whether permitted by law or applied by juries will not be available: second-hand smoke cases. In October 1991, a class action was filed against the tobacco companies on behalf of the

297. Henry J. Reske, *Cigarette Suit Dropped*, A.B.A. J., Feb. 1993, at 30.

298. *Id.* (reporting withdrawal of *Cipollone*); and Telephone Interview with Cynthia J. Walters, Esquire, of Short Hills, N.J., one of plaintiff's attorneys, July 29, 1993 (regarding discontinuance of *Dewey*).

299. Telephone Interview with Cynthia J. Walters, January 23, 1995.

300. *Wilks v. American Tobacco Co.*, No. 91-12,355(2)(W) (Cir. Ct., Washington County, Miss., May 11, 1993), slip op. at 1.

301. *Id.* at 4-6.

302. *Id.* at 4.

303. See Hansen, *supra* note 250, at 40.

nation's 60,000 flight attendants, who, it is alleged, have higher chances of becoming ill due to second-hand smoke on airplanes.³⁰⁴ Norma Broin, the representative plaintiff in that case, was diagnosed with lung cancer after working as a flight attendant for thirteen years.³⁰⁵ Broin followed an especially health-conscious lifestyle; she was athletic, vegetarian and had never smoked.³⁰⁶ The assumption of risk defense will, obviously, be inapplicable in cases of this kind. In addition, plaintiffs in some states may be able to circumvent their tort reform statutes; it is quite conceivable, for example, that a court might construe a statute like New Jersey's³⁰⁷—which is focused on "the ordinary consumer and user"—not to bar an action by victims of second-hand smoke. These cases will benefit from increasing concern about second-hand smoke and from governmental data showing that as a result of second-hand smoke, 3,000 people die from lung cancer, 30,000 die from heart disease and 7,500 to 15,000 infants are hospitalized for respiratory infections each year.³⁰⁸ Of course, the tobacco industry may be able to save themselves yet again, not in the courtroom, but by returning to the state capitals with new tort reform bills.

D. Handguns

In 1985, Maryland's highest court handed down a decision in *Kelley v. R.G. Industries, Inc.*,³⁰⁹ which held that victims shot with "Saturday Night Specials"—small, cheap handguns—could bring strict liability claims against the manufacturers of those guns. Its decision was legally modest but politically daring.

Handguns raise a number of issues in bold relief. The well-made handgun presents a pure specimen for risk-utility analysis. There is no possibility for hiding behind the failure-to-warn facade. Warnings are irrelevant. Handguns are not dangerous because of some latent defect or unknown hazard; the peril is not only obvious but intended. After all, handguns are weapons, and people purchase them because they are capable of causing harm. This makes handguns different from almost every other commercially available product. Knives can be used as weapons but, with the exception of switchblades, they are far more often used as kitchen implements and tools. Asbestos and tobacco are carcinogenic on account of their natural properties and it may be physically impossible to eliminate their risks, yet the

304. Mark Hansen, *Second-Hand Smoke Suit*, A.B.A. J., Feb. 1992, at 26.

305. *Id.*

306. *Id.*

307. *Supra* note 282.

308. *See* Hilts, *supra* note 242.

309. 497 A.2d 1143 (Md. 1985).

risks are byproducts or unintended consequences of the product. With handguns, however, the risk and utility are not only inseparable, they are one and the same. Moreover, defenses such as assumption of the risk and misuse are irrelevant in most handgun cases because the victim is not the user.

A careful examination of relevant data inescapably leads to the conclusion that handguns fail a risk-utility test.³¹⁰ In 1992, 12,489 Americans were murdered with handguns.³¹¹ There is strong evidence that a significant portion of these murders would not occur if handguns were not readily available.³¹² In the absence of a handgun, potential murderers often do *not* use another weapon instead; rather, the attack simply never occurs.³¹³ This is partly because most murders are not premeditated; they are impulsive acts erupting from arguments, drunken brawls, lovers' quarrels.³¹⁴ The notion

310. For a more detailed analysis, see Bogus, *supra* note 15, at 1113-23. See also Carl T. Bogus, *The Strong Case for Gun Control*, AM. PROSPECT, Summer 1992, at 19 [hereinafter Bogus, *Gun Control*].

311. FBI, UNIFORM CRIME REPORTS 1992 Table 2.9 at 18 (1993).

312. One study compared Seattle, Washington with Vancouver, British Columbia. These two cities, 140 miles apart, share a common climate and geography. They have the same frontier history, sitting on different sides of an international border because the boundary line was arbitrarily drawn at the 49th parallel in the Oregon Treaty of 1846. During the six-year study period (1980-1986), Seattle and Vancouver had nearly identical population sizes, unemployment rates, median household incomes, and percentages of households with incomes below \$10,000 (U.S.), as well as similar ethnic and racial demographics. They also shared current culture; for example, most of the same television shows were rated in the top ten in both cities. However, there was a significant difference in firearm regulation. In Seattle, where anyone could purchase a handgun after a five-day waiting period, handguns were present in 41% of all households. In Vancouver, where handguns were subject to strict regulation, 12% of all households had handguns. The two cities had markedly different rates of murder and aggravated assault—due exclusively to the different rates of gun-related murders and assaults. The rates of assault with knives and clubs were identical in the two cities, but the firearm assault rate in Seattle was eight times that of Vancouver. Similarly, murders with knives and other weapons were substantially identical in the two cities, but the rate of firearm murders in Seattle was five times greater than Vancouver's rate. This alone resulted in Seattle having nearly twice as many homicides as Vancouver. John Henry Sloan et al., *Handgun Regulations, Crime, Assaults, and Homicide*, 319 NEW ENG. J. MED. 1256 (Nov. 10, 1988).

See also Bogus, *Gun Control*, *supra* note 310; Franklin E. Zimring, *Firearms, Violence and Public Policy*, SCI. AM., Nov. 1991, at 48; Daniel W. Webster et al., *Reducing Firearm Injuries*, ISSUES IN SCI. & TECH., Spring 1991, at 73.

313. When an attacker turns to another weapons such as a knife or blunt instrument, the victim more often survives because the lethality rate of other weapons are generally much lower. See Zimring, *supra* note 312, at 49.

314. Of 22,540 murders in 1992, 8,818 fell into an "unknown relationship"

that handguns are safe in the hands of "law-abiding citizens" is myth. Murder frequently occurs between family members, friends, and acquaintances.³¹⁵ Only about twenty-three percent of murders are related to robberies or other felonies;³¹⁶ and only twenty-nine percent of people arrested for murder are previously-convicted felons.³¹⁷ The large number of handgun shootings is principally a product of the prevalence of handguns: Handguns are present in about a quarter of the households in the United States³¹⁸ and, when someone is overcome with rage, therefore, a handgun is often within reach.

Moreover, many of the murders that arise out of muggings and robberies would also be avoided if handguns were not so prevalent. Robbery also often happens on impulse. Twenty-five percent of adult offenders and forty percent of juvenile offenders say that they did not intend to rob anyone when they went out.³¹⁹ They often describe robberies as "just a sudden thing" or something that "just happened."³²⁰ It is, of course, much easier for a robbery to "just happen" when someone has a pistol in his pocket.³²¹ There is no good substitute weapon for the robber. Rifles are not concealable. The robber's best alternative may be the knife, but it is far inferior to the handgun. One cannot so easily use a knife to intimidate a group of victims or hold up retail clerks or bank tellers who are physically out of reach. Victims often run away from knife attacks. It takes more daring to hold people up at knife point; if the victim resists, it is harder physically and psychologically to plunge a knife into somebody than to pull a trigger.³²² Therefore, it is not

category. Of the remainder, 22.2% took place between strangers; the rest involved family members, lovers, acquaintances, friends, and neighbors. FBI, UNIFORM CRIME REPORTS 1991 Table 2.11 at 19. While it is possible that murders falling in the "unknown relationship" category involve strangers in higher proportion, 47.3% of all murders are *known* to be between friends, relatives and acquaintances.

315. In 1991, 22.3% of all murders occurred during a known or suspected felony such as a rape, robbery or burglary; 35.4% were related to a romantic triangle, brawl to the influence of alcohol or narcotics, or an argument; and 37.2% fell into "other" or "unknown" categories. FBI UNIFORM CRIME REPORTS 1991 Table 2.11 at 19 (1992).

316. *Id.*

317. Webster et al., *supra* note 312, at 75.

318. GALLUP POLL MONTHLY, May 1991, at 42.

319. CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 71 (1978).

320. *Id.* at 72.

321. "Robbers feel more in command when they carry a gun," writes Charles E. Silberman. *Id.* at 76.

322. For another reason, too, it is far more preferable for a victim to confront an attacker with a knife than with a gun: even if the weapon is used, one has a far better chance of surviving a knife attack. The lethality rate of knife attacks is one-fifth that

surprising that comparative data demonstrate that there are less robberies and aggravated assaults when handguns are not readily available.³²³ Handguns are used to commit 250,000 robberies and 316,000 aggravated assaults in the United States every year;³²⁴ a substantial number of these would not occur with other weapons.³²⁵

The benefits of handguns do not match these costs.³²⁶ Most Americans who own handguns do so solely for self-defense yet data show that people who have a handgun at home are far more likely to be shot with their own gun or have a family member shot with it than to use it kill an intruder.³²⁷ It is a relatively rare event for a private citizen to kill a felon with a handgun; for every instance of that kind there are more than a hundred handgun murders, accidents, and suicides.³²⁸ Moreover, the data suggest that

of handguns. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE CITIZEN'S GUIDE TO GUN CONTROL* 15 (1987).

323. See *supra* note 311.

324.. Handguns are also used in 14,700 rapes annually. STATISTICAL ABSTRACT OF THE UNITED STATES 1993 No. 311 at 197 (113th ed.).

325. Suicides are another important consideration. About 32,000 Americans committed suicide in 1990, up from about 23,500 in 1970. STATISTICAL ABSTRACT OF THE UNITED STATES 1993 No. 126 at 91 (113th ed.). The rise is due exclusively to the increase in the number of suicides with firearms; the number of suicides by other means has remained steady. *Id.* No. 136 at 98. Researchers long ago noted that states with stricter gun control laws have had lower suicide rates. David Lester & Mary E. Murrell, *The Influence of Gun Control Laws on Suicidal Behavior*, 137 AM. J. PSYCHIATRY 121, 122 (Jan. 1980). Cf. Ronald V. Clarke & Peter R. Jones, *Suicide and Increased Availability of Handguns in the United States*, 28 SOC. SCI. MED. 805 (1989).

Suicide also is often an impulsive act, particularly among teenagers. In fact, the odds that a potentially suicidal adolescent will kill himself increase 75 times greater when a gun is in the home. *Guns and Adolescent Suicides*, 266 J.A.M.A. 3030 (Dec. 4, 1991). This is one instance, however, where a long gun is likely to be used if a handgun is not available. See David A. Brent, *The Presence and Accessibility of Firearms in the Homes of Adolescent Suicides*, 266 J.A.M.A. 2989, 2994 (Dec. 4, 1991). Nevertheless, the fewer homes there are with handguns, the fewer there are likely to be with guns of any type—and the fewer suicides there are likely to be.

326. This refers to the benefits of handguns in civilian hands. Obviously, handguns have special utility for law enforcement officers and military personnel.

327. ZIMRING & HAWKINS, *supra* note 322, at 30.

328. In 1992, for example, handguns were used in 12,489 murders and in 262 instances (2% of the total) that were classified as justifiable homicides by private citizens. FBI, UNIFORM CRIME REPORTS 1992, *supra* note 311, Table 2.16 at 22 (reporting justifiable homicides) and Table 2.9 at 18 (reporting murders). See also Peter Applebome, *Verdict in Louisiana Killing Reverberates Across Nation*, N.Y. TIMES, May 26, 1993, at A14 (providing annual figures of justifiable homicides for the

handguns do not significantly deter burglaries.³²⁹ Besides recreation, therefore, the principal utility of handguns is that they give some owners a false sense of security. It is impossible to quantify emotional benefits but—however great these may be—they are surely dwarfed by the terror experienced by the nearly half a million Americans who find themselves looking down the barrel of a handgun each year,³³⁰ by the pain and suffering of the approximately 50,000 Americans who are wounded in handgun shootings annually,³³¹ by the grief of people who have lost family members in handgun shootings; or the generalized apprehension of gun violence that permeates all levels of society.

In the face of these kinds of data, the Maryland high court might well have determined that *all* handguns fail a risk-utility test and should be subject to strict liability.³³² It took, however, the more modest step by applying strict liability only to the subset of handguns it characterized as Saturday Night Specials. If the court thought that by taking this smaller step it would mitigate any potential political reaction, it was mistaken. Following the now familiar pattern, lobbyists were immediately dispatched to Annapolis to lobby the Maryland General Assembly for legislation specifically overturning the *Kelley* decision.³³³ Leading the charge was one of the nation's most notorious lobbying organizations, the National Rifle Association.³³⁴ The General Assembly passed legislation that overturned *Kelley* and that also

past five years).

Firearms are used in almost 19,000 suicides annually. U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE U.S. 1993 No. 136 at 98 (113th ed.). It is estimated that handguns are used in 83% of all firearm-related suicides. Charles H. Browning, *The Epidemiology of Suicide: Firearms*, 15 COMPREHENSIVE PSYCHIATRY 549, 549 (1974).

329. In the Seattle-Vancouver study, both cities had similar burglary rates even though so many more Seattle households had handguns. *See supra* note 312. *See also* Bogus, *supra* note 15, at 1117-18.

330. *See* BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1992 No. 298 at 185 (112th ed.).

331. *See* Bogus, *supra* note 15, at 1121 n.81.

332. The court apparently did not know that most handguns implicated in crime are not Saturday Night Specials but relatively expensive, high-quality weapons. *See* SILBERMAN, *supra* note 319, at 80-81; *The Snub Nosed Killers: Handguns in America*, COX NEWSPAPERS (Dec. 1981); Steven Brill, *The Traffic (Legal and Illegal) in Guns*, HARPER's, Sept. 1977, at 37, 41.

333. *See* Bogus, *supra* note 15, at 1145-48.

334. Spending more than \$5.7 million per election cycle, the N.R.A.'s political action committee today rates fourth nationally among PACs in money spent. Federal Election Commission, *PAC Activity Rebounds in 1991-92 Election Cycle* (37-page press release), at 12.

banned Saturday Night Specials outright in Maryland.³³⁵ In what became the most hotly contested political campaign of any kind conducted in Maryland up to that time, the N.R.A. then sought to overturn the ban by state-wide referendum.³³⁶

Few voters were aware of the liability issue, which had started the political imbroglio and remained an important part—arguably the most important part—of the legislation they were being asked to pass judgment on. The only publicly visible issue was whether Saturday Night Specials should be banned in the state.³³⁷ In the November 1988 election, Maryland voters approved the law by a wide margin.³³⁸ Thus, in Maryland Saturday Night Specials are banned but someone who is nevertheless shot with a Saturday Night Special cannot assert a products liability claim against the manufacturer or seller of that gun. The N.R.A., fearful that other state courts might find the *Kelley* case persuasive, pressed for legislation barring *Kelley*-style decisions in other states. Five Western states passed legislation precluding their courts from imposing generic liability on guns.³³⁹

The handgun experience, therefore, parallels what occurred with asbestos and tobacco. In each situation, a high state court applied the risk-utility test to a product category. The essence of each decision was that strict liability attaches to unreasonably dangerous products even if alternatives are not available and the product cannot be made reasonably safe. All of the decisions were made deliberately and flowed naturally from a mature body of products liability law. It could not be said that these cases represented extensions of law; they are more accurately characterized as considered applications of existing law.

335. MD. CODE ANN. art. 3A, § 36-I(L) (1988).

336. See Bogus, *supra* note 15, at 1145-48.

337. The products liability issue rarely if ever appears even in historical accounts of what transpired in Maryland. See OSHA GRAY DAVIDSON, UNDER FIRE: THE NRA & THE BATTLE FOR GUN CONTROL 138-41 (1993); JOSH SUGARMANN, NRA: MONEY, FIREPOWER & FEAR 224-29 (1992).

338. See Bogus, *supra* note 15, at 1147.

339. CAL. CIV. CODE § 1714.4 (West 1986); COLO. REV. STAT. § 13-21-501 (1986); IDAHO CODE § 6-1410 (1986); MONT. CODE ANN. § 27-1-720 (1987); NEV. REV. STAT. § 41.131(1) (1985).

III. JURISPRUDENTIAL CONSIDERATIONS

A. *Judicial versus Legislative Decisionmaking*

Writing in the *Minnesota Law Review* in 1963, Professor Cornelius J. Peck made a prescient comment. "Probably the greatest danger of an active and openly creative reform role for the judiciary," he said, "is that it might produce or even facilitate a legislative counterattack by the lobbies and pressure groups that favor the status quo."³⁴⁰ Whenever court decisions can be portrayed as policy-making, Peck noted, lobbyists can persuade legislators that they are at least as competent as judges to make such decisions.³⁴¹ To avoid this result, Peck recommended that courts follow Cardozo's example in *MacPherson v. Buick Motor Co.*,³⁴² which, as Peck put it, demonstrates how to "accomplish a major reform while insisting throughout an avowedly uncreative opinion that the result was dictated by a principle drawn from earlier cases."³⁴³ Peck also suggested that judges consult Karl Llewellyn's treatise, which lists sixty-four techniques for circumventing precedent.³⁴⁴

Why should courts protect the common law? For Peck, this was not merely a turf battle. He believed that judges were better able to make tort law.³⁴⁵ It is judges who observe how the law works first hand. "[F]requent encounters with a general problem, presented in various contexts that an endless variety of fact patterns provides, give courts a type of experimental program in which they can formulate and test a governing rule," he wrote.³⁴⁶ Contrary to the view that politicians have the better grasp on social mores and popular opinion, Peck believed that the experience judges have "with jury

340. Cornelius J. Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 293 (1963).

341. *Id.*

342. 111 N.E. 1050 (N.Y. 1916).

343. Peck, *supra* note 340, at 294. Judge Posner makes much the same point. "MacPherson is the quietest of revolutionary manifestos, the least unsettling to conservative sensibilities," he writes. POSNER, *supra* note 74, at 109.

344. Peck, *supra* note 340, at 294.

345. Peck moderated his view somewhat in later years. Two decades later he reevaluated his earlier conclusion and wrote:

My conclusion [in the *Minnesota Law Review*] was that there was no reason for courts to defer generally to the legislature for development and revision of tort law. Things have changed somewhat since then, primarily in ways that strengthens the legislative process, but not enough to justify a conclusion that the legislative process is always superior to the judicial process.

Cornelius J. Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1, 6-7 (1983).

346. Peck, *supra* note 340, at 297.

refusals to apply the rules propounded by trial judges gives them some basis for determining whether the rules are compatible with the current values of society.³⁴⁷ He argued that judges had equal access to library-oriented materials that legislative reference services provide legislators;³⁴⁸ he conceded that legislatures have superior investigatory methods of acquiring information germane to making policy, but he believed they seldom accumulated or studied such information.³⁴⁹

If anything, the relative advantage that the courts have over the legislatures in making policy in traditional common law areas is stronger today. The number of attorneys in the state legislatures has fallen substantially in recent years; now only sixteen percent of legislators nationwide identify themselves as attorneys.³⁵⁰ While the increasing diversity of legislators may be good thing generally, the declining number of attorneys impairs the ability of the legislatures to understand legal issues. The old adage that "a little knowledge is dangerous" is certainly true for the law, and non-attorney legislators are particularly susceptible to the political rhetoric that so often obscures legal issues. Moreover, regardless of their training, most legislators do not have the time or staff assistance they need to carefully study technical areas. Eleven percent of state legislators nationwide are full-time legislators; the rest make their primary living doing something else.³⁵¹ Only eight states have "professional legislatures," which are characterized by relatively well-paid, full-time legislators, stable membership, and adequate staff.³⁵²

Even where there are significant resources, few legislators have the time to study an issue like products liability. Several years ago journalist Fred Barnes spent some time with John P. Hiler, a Republican from Indiana, to see what life was like for a member of Congress.³⁵³ Hiler was a graduate of the

347. Peck, *supra* note 340, at 297.

348. Peck, *supra* note 340, at 279.

349. Peck, *supra* note 340, at 296.

350. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE LEGISLATORS' OCCUPATIONS: A DECADE OF CHANGE 3 (1987). This may understate the number of attorneys somewhat since it does not include legislators with law degrees who list their occupation as "full-time legislator" rather than "attorney." Eleven percent of all legislators nationwide designate the legislature as their sole profession. A quarter of all legislators identify themselves within a range of business occupations (e.g., "business owner," "managerial/executive"); 10% list themselves as working in agriculture, 8% in education. *Id.* at 2-4.

351. *Id.* at 2.

352. KARL T. KURTZ, CHANGING STATE LEGISLATURES 1 (National Conference of State Legislatures, 1989). See also Peck, *supra* note 340, at 277.

353. Fred Barnes, *The Unbearable Lightness of Being a Congressman*, NEW REPUBLIC, Feb. 15, 1988, at 18.

University of Chicago where he had studied under economist Arthur Laffer, and in 1980 he went to Washington "inflamed with the idea of overturning a half century of government interference with the economy."³⁵⁴ He soon discovered, however, that political survival required almost complete devotion to constituent service and district issues.³⁵⁵ While he yearned to spend time on "macro issues"³⁵⁶ he was consumed instead with matters like obtaining an urban development grant to build a parking garage or persuading the Pentagon to buy trucks made in his district.³⁵⁷ Fully ten percent of his time was devoted to the biggest industry in his district, prefabricated homes.³⁵⁸ Another large share of time was spent on constituent mail, supervising responses to the 500 to 600 letters received each week.³⁵⁹ Six members of his staff worked exclusively on constituent casework.³⁶⁰ Even in his fourth term, Hiler spent between a third and half of his time in his district in Indiana (depending upon whether it was an election year), much of it devoted to fund-raising.³⁶¹ During two full days that Barnes followed him through a hectic schedule of television interviews, speeches and meetings, Hiler did not have time to read a newspaper.³⁶² Hiler's routine is not unusual; those who are presumptuous enough to devote themselves to working on national issues instead of carrying water for constituents are often involuntarily retired in the next election.³⁶³

How likely is that someone like Hiler would find the time to reach a considered judgment about the intricacies of products liability law? This is precisely the kind of issue on which a legislator is most vulnerable to political pressure—a matter that may seem relatively minor in the grand scheme of things and will be invisible to the electorate. If Hiler received a call from the chief executive officer of the prefabricated home company or the truck factory in his district asking him to vote for a products liability bill, he would be hard pressed to say no.

These are the political realities that affect product liability issues in the legislative arena. It would be hard enough for courts to accept legislative intrusion into a traditional common law area if legislation were carefully

354. *Id.*

355. *Id.*

356. Hiler's phrase. *Id.*

357. *Id.* at 19.

358. *Id.*

359. *Id.* at 20.

360. *Id.*

361. *Id.*

362. *Id.*

363. See, e.g., LINDA L. FOWLER & ROBERT D. MCCLURE, POLITICAL AMBITION: WHO DECIDES TO RUN FOR CONGRESS 220-21 (1989).

considered and made on a principled basis—if perhaps it reflected community mores. But there is little evidence suggesting that is the case. There were no public outcries when the courts handed down their decisions in *Halphen*,³⁶⁴ *Dewey*,³⁶⁵ *Wilks*,³⁶⁶ or *Kelley*.³⁶⁷ These decisions offended particular industries, not society-at-large.³⁶⁸

A principle of legislative restraint with respect to traditional common law areas lets legislators take one nettlesome set of problems off their plate. In June 1994, while it was in the midst of trying to deal with health care reform and a thirty billion dollar crime bill, the Senate was forced to take up the so-called Product Liability Fairness Act.³⁶⁹ This legislation required members to grapple with a number of highly technical areas, including the intricacies of products liability doctrine, subrogation law, and punitive damages, which traditionally fell within the judicial domain. Debate over the bill triggered a filibuster, which supporters repeatedly, and ultimately unsuccessfully, sought to break.³⁷⁰ Both common law issues, and important legislative matters such as health care and crime, would benefit from more considered attention if the legislature were more reluctant to intrude in traditional common law areas.

The courts decry "legislative tinkering"³⁷¹ with products liability law, but there is little more they can do, except to try to refrain from making decisions that stimulate legislative action.³⁷² How they try to do this is

364. *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986).

365. *Dewey v. R.J. Reynolds Tobacco Co.*, 523 A.2d 712 (N.J. Super. Ct. Law Div. 1986), *aff'd in part, rev'd in part*, 577 A.2d 1239 (N.J. 1990).

366. *Wilks v. American Tobacco Co.*, No. 91-12,355(2)(w) (Cir. Ct., Washington County, Miss. May 11, 1993) slip op. at 1.

367. *Kelley v. R.G. Indus. Inc.*, 497 A.2d 1143 (Md. 1985).

368. If anything, news reports appeared sympathetic to the decisions. *See, e.g.*, David Margolick, *Judge Says Hazards Make Cigarettes Defective by Law*, N.Y. TIMES, May 13, 1993, at A14. The public is concerned about dangerous products such as handguns and cigarettes, and frustrated with the failure of the political process to control their distribution. Seventy-two percent of all Americans believe that laws covering the sale of handguns should be more strict, for example. David W. Moore & Frank Newport, *Public Strongly Favors Stricter Gun Control Laws*, GALLUP POLL MONTHLY, Jan. 1994, at 18, 19. More than two-thirds of all Americans also favor restrictions on smoking, such as requiring that smoking in hotels, workplaces and restaurants be limited to certain set aside areas. McAneny, *supra* note 265, at 22.

369. S. 687, 103d Cong., 2d Sess. (1994).

370. Jonathan D. Glater, *Bill to Limit Product Liability Awards Dies in Senate*, WASH. POST, June 30, 1994, at D13; Viveca Novak, *Product-Liability Reform in Senate Hit by Filibuster*, WALL ST. J., June 29, 1994, at A8.

371. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 797 P.2d 527, 531 (Wash. 1990).

372. I discuss this in more detail in Bogus, *Pistols, Politics and Products*

critically important.³⁷³ Courts must not avoid imposing liability on products protected by powerful lobbies, which would simply grant certain industries a de facto exemption from products liability and result in an unequal application of law. Some courts may have succumbed to that temptation in the handgun cases.³⁷⁴ Judges, however, may take Cornelius Peck's suggestion of emulating Cardozo's technique in *MacPherson* of writing an opinion that emphasizes how the decision flows from established precedent and accepted norms and does not dramatically herald itself as breaking of new legal ground. Yet judges ought to not muddle or obscure their reasoning—by camouflaging generic liability as failure-to-warn issues, for example. In *MacPherson* Cardozo, as always, was clear and straightforward. Had the automobile industry lobbyists rushed to Albany with the *MacPherson* decision in one hand and a proposed products liability bill and political contributions in the other, they would have faced the formidable task of persuading legislators not only why they should reverse this step but why they should sweep away more than half a century of legal precedent. Cardozo so plainly and cogently explained how the natural course of evolution brought the common law to this particular decision that potential "tort reformers" would have looked like radicals.

The courts should try to drive home several other points. Generic liability is not a judicial ban of products. A manufacturer is free to continue selling his product regardless of whether liability attaches. He may, of course, be forced to increase the price of the product to cover liability costs, and he may be driven from the market if he cannot do so successfully. Yet that is exactly the market-determined result that many claim they want. "Decisions regarding which product categories should generally be available to users and consumers are best left to the marketplace," Henderson and Twerski write, for example.³⁷⁵ It is the court's responsibility however to redress harm that one

Liability, *supra* note 15, at 1156-64.

373. It may, for example, be counterproductive to use the judicial pen to excoriate the powerful. In an opinion in the *Haines* cigarette case, Judge H. Lee Sarokin was moved enough by the tobacco company's attempt to conceal damning information about the health effects of cigarettes to ask rhetorically: "Who are these people who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own property!" *Haines v. Liggett Group, Inc.*, *supra* note 261, at 683. The tobacco companies successfully petitioned the Third Circuit to remove Judge Sarokin from the case on the grounds that his opinion evidenced bias. See Andrea Sachs, *Judge Forced Off Tobacco Suit*, A.B.A. J., Nov. 1992, at 16; David Margolick, *Federal Judge in Tobacco Cases Ousted From Tobacco Case Over Industry's Complaint of Bias*, N.Y. TIMES, Sept. 9, 1992, at A1.

374. This is discussed in Bogus, *Pistols, Politics and Products Liability*, *supra* note 15.

375. Henderson & Twerski, *Proposed Revision for § 402A*, *supra* note 47, at

party inflicts on another,³⁷⁶ and that is what the court is doing when it requires those who benefit from a product to pay for the costs that fall indiscriminately upon others. The best way to fend off legislative reversal is to explain this clearly.

One of the more frequent reasons judges give for refusing to apply strict liability to a product category is that such decisions should only be made by the legislature.³⁷⁷ Surprisingly often, courts have concluded that the fact that the legislature has not banned a particular product represents a legislative determination that the product is not unreasonably dangerous.³⁷⁸ Yet, as the Michigan Supreme Court put it, "a legislature legislates by legislating, not by doing nothing, not by keeping silent."³⁷⁹ It is also a misunderstanding of the judicial function to assume that all decisions that implicate public policy must be made by the legislature.³⁸⁰

The common law has become underappreciated by legislators and judges alike. Legislation rose into ascendancy during the era of the New Deal, when it became necessary to establish comprehensive regulatory systems.³⁸¹ No one can reasonably argue with Guido Calabresi's observation that "[t]he slow, unsystematic, and organic quality of common law made it clearly unsuitable

1521.

376. This is perhaps the most fundamental role of the common law. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 468 (1973).

377. *E.g.*, *Kotler v. American Tobacco Co.*, 731 F. Supp. 50, 53 (D. Mass. 1990) (expressing the view in a cigarette case that the risk-utility theory "imprudently arrogates to the judicial process some very significant societal determinations"); *Schemel v. General Motors Corp.*, 261 F. Supp. 134 (S.D. Ind. 1966) (making the same point although not a generic risk case, unless one considers cars capable of exceeding 100 mph to constitute a product category), *aff'd*, 384 F.2d 802 (7th Cir. 1967).

378. *E.g.*, *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1275 (5th Cir. 1985); *Martin v. Harrington and Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984); *Mavilia v. Stoeger Indus.* 107, 111 (D. Mass. 1983).

379. *Wycko v. Gnodtke*, 105 N.W.2d 118, 121-22 (Mich. 1960). I borrow this quotation from Professor Peck, who also paraphrased H.L.A. Hart's observation that "the Constitution of the United States and each of the state constitutions prescribe the ways in which bills shall become law, and failing to enact a bill is not one of them." Peck, *Reform of Tort Law*, *supra* note 340, at 291.

380. The war on the common law is related to a larger war on the courts. One means of denigrating the judicial function is to suggest that courts overstep their bounds whenever, in any realm—constitutional law as well as common law—they take policy considerations into account. See, *e.g.*, Lino A. Graglia, *Constitutional Interpretation*, 44 SYRACUSE L. REV. 631 (1993).

381. CALABRESI, *supra* note 4, at 5-7.

to many legal demands of the welfare state."³⁸² Still, certain areas are better understood by the courts, and certain problems are better addressed through the judicial process. Rapid, sweeping, comprehensive change can bring about much good—and do much harm. No one is wise enough to comprehend all of the ramifications of a major change or prescient enough to anticipate all of its consequences.

The advantage of the common law is that it is an evolutionary process. Each step becomes an experiment which is subjected to a crucible of examination and reexamination. Trial judges watch the law function first-hand; appellate judges constantly reevaluate doctrine. When well-intended rules have undesirable consequences, the affected parties eventually will come before the court. Legislators are in a far less advantageous position to learn how common law rules actually work.

The traditional common law areas represent the greatest substantive areas of judicial expertise, and just as the courts defer to administrative agencies within their areas of specialization, the legislatures should grant deference to the courts within theirs. Even when legislators disagree with decisions handed down by the courts, respect for the common law should inspire a reluctance to intervene—and a particular reluctance to intervene quickly. Almost always, more can be gained by waiting than will be lost. Rarely does new case law result in social calamity. The system is enormously flexible; rules that do not work in particular situations are often bent by the court or disregarded by the jury. As Holmes put it: "[T]he law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism. . . ."³⁸³ Meanwhile, the ability to understand the ramifications of new doctrine increases with time. Much would have been learned if *Halphen*,³⁸⁴ *Kelley*,³⁸⁵ and *Dewey*³⁸⁶ had not been so quickly overturned.

The courts have final authority in matters involving constitutional law, and therefore the concept of judicial restraint is critical in constitutional cases. The situation is reversed in common law areas, however; just as there is no check on bad constitutional law made by courts, there is no check on bad common law made by legislatures. It is time to recognize a parallel doctrine of legislative restraint.

382. He goes on to write: "At the same time, the speed with which perceived economic crises have followed upon economic crises has brought forth legislative responses even in areas where the common law might have been capable of making the necessary adjustments." CALABRESI, *supra* note 4, at 5.

383. HOLMES, *supra* note 89, at 32.

384. 484 So. 2d 110 (La. 1986).

385. 497 A.2d 1143 (Md. 1985).

386. 523 A.2d 712 (N.J. Super Ct. Law Div. 1986), *aff'd in part, rev'd in part*, 577 A.2d 1239 (N.J. 1990).

At least in some quarters, there appears to be increasing support for the view that the courts have an appropriate role—that common law principles require that manufacturers of unreasonably dangerous products be held responsible for costs their products impose on society-at-large. Although it would have been unthinkable even a few years ago, two states are currently prosecuting product liability claims against tobacco manufacturers, seeking damages for the medical costs incurred by the state to treat patients with tobacco-related disease.³⁸⁷ There is also growing interest in holding handgun and assault weapon manufacturers liable to the innocent victims shot with those weapons.³⁸⁸ This should give courts some measure of comfort.

B. Judicial versus Administrative Regulation

Why should the courts play a role in condemning entire product categories? Should this not be entrusted to regulatory agencies, which have the resources, technical expertise and legislative mandate to determine what products should not be marketed? Administrative agencies must, of course, serve as the first line of defense against dangerous products. Only bureaucracies with technically trained staffs can serve as society's gatekeeper for the incredible myriad of products which are distributed in modern society: food and water; drugs and medical equipment; motor vehicles, boats, and airplanes; mechanical and electrical equipment; chemicals of all kinds; even radiological, biological, and genetic material. Yet there is an important, indeed essential, role for the courts as well.

387. Michael Janofsky, *Mississippi Seeks Damages From Tobacco Companies*, N.Y. TIMES, May 24, 1994, at A12; Larry Rohter, *Florida Prepares New Basis to Sue Tobacco Industry*, N.Y. TIMES, May 27, 1994, at A1.

388. Currently pending is an action against the manufacturers of the guns, high-capacity magazines, and trigger systems that Guian Luigi Ferri used to kill eight people at the law firm of Pettit & Martin in July 1993. This suit is brought under negligence theory on the basis that a reasonable person would not put weapons of this kind into commerce, and some of San Francisco's most distinguished firms are representing plaintiffs on a *pro bono publico* basis. Maura Dolan, *Mass-shooting Survivors Sue Gun Manufacturers*, PHILADELPHIA INQUIRER, May 19, 1994, at A2. See also Stephanie B. Goldberg, *Lawyers Debate Tragedy's Lessons*, 79 A.B.A. J. 20 (1993).

Two other projects have also been established recently. The Seton Hall and Catholic University law schools have announced a joint effort to bring product liability actions against gun manufacturers through their student clinics, and a committee of distinguished lawyers has been established in New York City with similar objectives. Joanne Wojcik, *Assault Weapon Victims Return Fire With Creative New Liability Theories*, BUS. INS., June 20, 1994, at 1; *Lawyers Take Aim at Handgun Violence*, N.Y. TIMES, April 12, 1994, at B3.

Administrative regulation has limits, and dangerous products will slip through the gate. For several reasons, this is inevitable. Manufacturers sometime succeed in bringing products to market, or in keeping products on the market, by concealing critical information from regulatory agencies. Examples in which this has occurred include asbestos,³⁸⁹ PCBs,³⁹⁰ Dalkon Shield,³⁹¹ the anticholesterol drug MER/29,³⁹² heart catheters,³⁹³ and to

389. See *supra* notes 157-216 and accompanying text. OSHA was, in part, established because of the attention over the asbestos problem generated by litigation. BRODEUR, *supra* note 174, at 80-81, 336-39; *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1976, 1085 n.16 (5th Cir. 1973).

390. Monsanto, the sole producer of polychlorinated biphenyls (PCBs) in the U.S., knew since at least 1936 that PCBs caused severe liver damage, since at least 1965 that they could be a potent carcinogen, since at least 1969 that PCBs were contaminating food sources in the U.S., Canada, and parts of Europe, and since at least 1971 that PCBs were accumulating in wildlife and causing reproductive disorders and birth defects. Monsanto did everything within its power to keep this information from regulatory officials; one of its top executives was ultimately convicted for participating in a scheme to submit fraudulent data to EPA and FDA. General Electric and Westinghouse, which made transformers containing PCBs, also knew about and actively concealed critical information from federal regulators. This information has been brought to light through civil litigation. Eric F. Coppelino, *Pandora's Poison*, SIERRA, Sept./Oct. 1994, at 41.

391. The A.H. Robins Company distributed 4.5 million Dalkon Shield intrauterine devices knowing that data released about them were false and that women with Dalkon Shields ran grave risks, including the risk of pelvic inflammatory disease ("PID") which may result in infertility or death. MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* 3, 53-88 (1985). Because it was a medical device rather than a drug, the Dalkon Shield was distributed without premarket clearance from FDA. *Id.* at 53-54. At that time, FDA authority with respect to medical devices was limited to requesting injunctions over the interstate sales of medical devices that the FDA could prove were unsafe. *Id.* In 1972, the first lawsuits alleging that the Dalkon Shield was unreasonably dangerous were filed. *Id.* at 9; *Tetuan v. A.H. Robins Co.*, 738 P.2d 1210, 1223 (Kan. 1987). Two years later, as the first cases were approaching trial, the FDA requested that Robins withdraw the Dalkon Shield from the market. Robins suspended sales of the Dalkon Shield within the U.S. but continued to market it abroad. *Id.* at 1220.

Through evidence gathered in products liability litigation, it was revealed that, in early 1975, Robins' president and its chief counsel directed employees to systematically destroy documents that associated the Dalkon Shield with PID, and that, in order to keep the highly profitable Dalkon Shield on the market, Robins' executives had blatantly lied to the medical community, FDA, and Congress about the effectiveness and safety of the Dalkon Shield. *The Dalkon Shield Litigation: Revised Annotated Reprimand by Chief Judge Miles W. Lord*, 9 *HAMLIN L. REV.* 7, 24-25 (1986). According to the company's own estimate, in the United States alone 90,000 women were injured by the Dalkon Shield. MINTZ, *supra* at 7. Robins' top executives

some extent cigarettes.³⁹⁴ As of this writing investigations also are pending

remained completely unrepentant, however, and into the early 1980s, the company was reporting profits exceeding \$50 million per annum. *The Dalkon Shield Litigation*, *supra* at 8-10. See MINTZ, *supra*; Tetuan v. A.H. Robins Co., 738 P.2d 1210 (Kan. 1987); *The Dalkon Shield Litigation*, *supra* at 77.

Eventually, however, products liability litigation forced the company to pay a price. By August 1985, Robins had been sued by more than 15,000 women, and Robins and its insurance company had paid out \$530 million in settlements, judgments and legal expenses. Six thousand cases were still pending, and new lawsuits were being filed at the rate of fifteen per day. Robins filed for protection under Chapter 11 of the Bankruptcy Code. In 1988, the court approved a plan of reorganization, under which a fund of \$2.33 billion was to be established to compensate victims of the Dalkon Shield. Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 624-27 (1992).

392. In order to obtain FDA approval to market MER/29, the Richardson-Merrell Company repeatedly submitted falsified data to FDA and other clinical investigators. After the drug was approved and FDA learned that physicians were reporting that MER/29 seemed to cause serious eye disease, the company engaged in a campaign of misinformation and political pressure to thwart administrative action. They succeeded in keeping the drug on the market for two years. The company and three of its officials were ultimately indicted. Based solely on penalties inflicted by the criminal justice system, however, they may have concluded that their unlawful conduct was worth it; none of the individuals was incarcerated, and the company was fined only \$80,000. RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE 289-99 (1988); Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116 (1968).

393. C.R. Bard Inc. allegedly concealed from the FDA and medical community at large knowledge that its heart catheters, which were used to open clogged arteries, were periodically breaking during surgery. In an attempt to fix the problem without having to reveal it, Bard secretly redesigned its catheter and sold about 22,000 redesigned catheters to surgeons, who used them under the mistaken belief that they were the FDA-approved design. Bard manufactured at least some of these catheters at an undisclosed location. Philip J. Hilts, *Manufacturer Admits to Selling Untested Devices for Heart*, N.Y. TIMES, Oct. 16, 1993, at 1; Elyse Tanouye & George Anders, *C.R. Bard's Chairman and Five Others Are Indicted in Heart-Catheter Scandal*, WALL ST. J., Oct. 18, 1993, at A3.

394. From internal company documents obtained by the *New York Times*, it recently has been learned that at least as early as June 1963 executives at Brown & Williamson knew from the company's own research that cigarettes predisposed smokers to lung cancer and contributed to heart disease, and knew as well that nicotine was addictive, but made a considered decision to suppress that information and, specifically, to conceal it from the Surgeon General of the United States. The company thereafter continued to deny that cigarettes caused disease or were addictive. In the 1960s, the company also learned a great deal about how to make a safer cigarette but decided to terminate research and development for such a product and to

concerning silicone breast implants³⁹⁵ and the Halcion sleeping pill.³⁹⁶ Most manufacturers may be responsible most of the time, but human nature is such that there will always be attempts to bluff regulators. Whenever that happens, the advantage lies with the manufacturer. Administrative agencies

suppress its prior research. A scientist formerly employed by Liggett & Meyers has also recently revealed that in 1955 that company started research aimed at producing a safer cigarette, and that by 1979 the company had developed and was ready to market such a cigarette but decided not to do so. Philip J. Hilts, *Method to Produce Safer Cigarette Was Found in 60's, but Company Shelved Idea*, N.Y. TIMES, May 13, 1994, at A20; Philip J. Hilts, *Tobacco Company Was Silent on Hazards*, N.Y. TIMES, May 7, 1994, at A1.

Scientists formerly employed by Philip Morris Company have recently testified before Congress that in the 1970s the company launched a research project to learn as much as possible about nicotine and that their results suggested that nicotine was addictive "on a level comparable to cocaine." The company terminated further research in 1983 and allegedly threatened one of the scientists who conducted the project with legal action if he ever spoke about or published his findings. Philip J. Hilts, *Scientists Say Cigarette Company Suppressed Findings on Nicotine*, N.Y. TIMES, April 29, 1994, at A1.

395. Dow Corning Corporation terminated internal research that indicated that some forms of silicone, including the kind it was using in breast implants, are biologically active and affect the immune system. It should be noted, however, that the results were not conclusive and that other ongoing research suggested that silicone was inert. Thus, the company may have deliberately discontinued research yielding unfavorable results while continuing research that was more likely to produce desired results. Sandra Blakeslee, *Dow Corning had Conflicting Findings on Silicone*, N.Y. TIMES, May 9, 1994, at A11. In addition, Dow has admitted that some of its internal research documents were falsified, although it contends this occurred because employees wanted to reduce paperwork rather than conceal data. *Dow Corning Says Records on Implants Were Altered*, N.Y. TIMES, Nov. 11, 1992, at D2.

It may eventually turn out that silicone breast implants are safe; current research seems to be leading in that direction. See Gina Kolata, *Study Finds No Implant-Disease Links*, N.Y. TIMES, June 16, 1994, at A18. Nevertheless, the point remains the same: (1) a manufacturer apparently was more interested in developing a research record to satisfy regulators than with discovering whether in fact its product was safe; (2) products liability litigation brought to light genuine questions of safety and stimulated the regulatory review and research necessary to determine whether, in fact, the product was safe; and (3) manufacturer nonfeasance and misfeasance was exposed through discovery in product liability litigation rather than through regulatory supervision.

396. Allegations have been made that the Upjohn Company concealed critical data from the FDA relating to Halcion. Steven R. Reed, *Investigation Reveals Upjohn Suppressed Dangers of Halcion*, TIMES UNION (Albany, NY), Oct. 9, 1994 at F1; and Philip J. Hilts, *Upjohn Facing F.D.A. Inquiry on Pill Effects*, N.Y. TIMES, April 27, 1994, at A13.

primarily rely on the manufacturers themselves for information.³⁹⁷ This will always be the case. As large as they may be, the administrative bureaucracies will never be able to replicate the research and testing of manufacturers. Thus, the manufacturer holds the cards and can choose which to lay on the table.

Beyond duplicity lies an even greater threat—politics. As Justice Stephen Breyer put it: "Regulatory bodies, after all, are politically responsive institutions, with boards, commissioners, or administrators appointed by the President, confirmed by the Senate, written about by the press, and, from time to time, summoned by Congressional committees to give public testimony."³⁹⁸ Agencies are dependent on Congress for both their regulatory authority and funding, and so eager are agencies to please the hands that feed them that agency budget requests routinely include projects that will serve the districts represented by members of key congressional committees—a practice that, it is estimated, adds between ten percent and thirty percent to the cost of agency programs.³⁹⁹ If this occurs, a call from an influential member of Congress who wants to know exactly why it necessary to take action that adversely and allegedly unfairly affects an important constituent must certainly concentrate the administrative mind.⁴⁰⁰

Another dynamic—which sociologists and political scientists call "co-optation" or "capture"—is also at work, especially in areas where the costs of regulation must be borne by a particular industry while the benefits are widely disbursed throughout society-at-large.⁴⁰¹ Political scientist James Q. Wilson describes how this works as follows:

The Food and Drug Administration (FDA), created out of popular revulsion against injuries and deaths caused by certain drugs and patent medicines, was expected to prevent the distribution of unsafe or ineffective drugs. But each drug scandal . . . would be followed by a period during which consumer and medical groups lost interest in FDA. Of course the drug manufacturers never lost interest in FDA because their profitability depended crucially on the speed and certainty with which the agency would approve drugs for marketing. Moreover, the FDA could not offer sufficient pay or research opportunities to attract many top-flight scientists to its

397. See Paul J. Quirk, *Food and Drug Administration*, in *THE POLITICS OF REGULATION* 204 (James Q. Wilson ed., 1980).

398. STEPHEN G. BREYER, *BREAKING THE VICIOUS CIRCLE* 49 (1993).

399. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 251 (1989) (describing research by political scientist Douglas Arnold).

400. See also W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 118-19 (1991) (agreeing generally that administrative agencies are subject to political forces).

401. *Id.* at 73-75, 77-78, 80-81.

ranks. Though many of its operators were quite competent, few were outstanding. And the people it did employ had a daunting task: to evaluate new-drug applications, each of which might contain as many as two hundred volumes of information, within the statutory limit of 180 days and with awareness of the possibility that new drug might save lives. The people with whom the FDA dealt on a daily basis were usually industry representatives, rarely critics of drug approvals. Under these circumstances it would be easy for many operators to resolve all doubts in favor of industry.⁴⁰²

The notorious story of the Ford Pinto illustrates the interplay of all of these factors.⁴⁰³ In 1969, the National Highway Traffic Safety Administration ("NHTSA") made it known that it was considering a series of new fuel system integrity standards, including a requirement that fuel tanks in cars and light trucks be able to withstand a thirty mph rear-end collision.⁴⁰⁴ This gave Ford special reason for concern because it knew that there were potential problems with the gas tank on a subcompact car that it was planning to introduce, to be called the Pinto. Then Ford Executive Vice President Lee Iacocca had decreed that the Pinto must weigh no more than 2,000 pounds and cost no more than \$2,000. This presented engineering problems. The Pinto had to be "thrifty" to meet the price goal, and the weight limit, as Robert Lacey puts it, had to be "achieved, basically, by cutting off the car's rear end."⁴⁰⁵ Engineers preferred putting the gas tank above the rear-axle to protect it in accidents, but to meet the goals the Pinto's gas tank was placed behind the rear axle, allowing only nine inches of "crush space" between the gas tank and rear axle.⁴⁰⁶ Moreover, the rear structure of the Pinto was not reinforced with longitudinal side-members and horizontal cross-members, as

402. *Id.* at 80.

403. The following description of the Pinto situation is drawn principally from the following sources: Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. Ct. App. 1981); FRANCIS T. CULLEN ET AL., CORPORATE CRIME UNDER ATTACK: THE FORD PINTO CASE AND BEYOND 145-308 (1987); ROBERT LACEY, FORD: THE MEN AND THE MACHINE 579-86 (1986); RUSSELL MOKHIBER, CORPORATE CRIME AND VIOLENCE 371-82 (1988).

404. The other standards related to side impacts and vehicle rollovers. Schwartz, *supra* note 403, at 1018.

405. LACEY, *supra* note 403, at 584.

406. Lacey writes:

The Pinto was the first modern U.S. Ford produced without rear subframe members, the solid steel skeleton which both carries the sheet metal of a conventional rear truck and also protects the fuel tank in the event of a rear-end collision.

LACEY, *supra* note 403, at 584.

were other Ford cars, and the rear bumper was nothing more than an ornamental chrome strip.⁴⁰⁷ This left the Pinto's gas tank vulnerable to rupture in accidents.

In order to determine whether the Pinto would meet the proposed new NHTSA standards, Ford secretly conducted more than forty tests on prototypes.⁴⁰⁸ The fuel tank ruptured in every test over twenty-five mph, resulting in fuel leakage not permitted under the new NHTSA standard.⁴⁰⁹ In at least one test, gas flooded the driver's compartment.⁴¹⁰ Ford engineers proposed a variety of "fixes" for the problem, such as lining the gas tank with a nylon bladder at a cost of \$5.25 to \$8.00 per car or reinforcing the rear structure with side and cross-members at cost of \$4.20 per car.⁴¹¹ But every penny counted in the effort to meet Iacocca's goals, and Ford executives rejected all of the engineering suggestions.⁴¹² They decided not to incorporate any of these features until at least 1977, when NHTSA regulations directed to side and rear-end impacts were scheduled to become effective.⁴¹³

Ford also filed a petition asking NHTSA to abandon or postpone its regulations relating to vehicle rollovers. In making its case to NHTSA, Ford readily conceded that new standards would save lives, which of course was something that NHTSA already knew and could not be reasonably refuted.⁴¹⁴ Indeed, Ford told NHTSA that it projected that the new standard would save 180 people from burning to death and an additional 180 people from serious burn injuries.⁴¹⁵ Ford also told NHTSA that it would cost \$11.00 per unit (car or light truck) to meet the standard, and that this would cumulatively cost

407. *Grimshaw*, 174 Cal. Rptr. at 360; Schwartz, *supra* note 403, at 1015.

408. MOKHIBER, *supra* note 403, at 375.

409. MOKHIBER, *supra* note 403, at 375; *Grimshaw*, 174 Cal. Rptr. at 360.

410. *Grimshaw*, 174 Cal. Rptr. at 360.

411. *Id.* at 361.

412. *Id.*

413. Schwartz, *supra* note 403, at 1018-19.

414. The notorious document in which Ford made its case, entitled, "Fatalities Associated with Crash-Induced Fuel Leakage Fires," concerned "only rollover consequences and costs." The injury estimates relate only to fires that would be prevented by an \$11 valve that would stop fuel from spilling out in rollover situations. The report notes that "other portions of the proposed regulations would also be expected to yield poor benefit-to-cost ratios," but when Ford later prepared a similar analysis for lateral and rear-impacts, it projected that safety benefits (\$102 million) would slightly exceed compliance costs (\$100 million) and was never filed with NHTSA. Schwartz, *supra* note 403, at 1020-21; LACEY, *supra* note 403, at 581-82; Telephone Interview with Gary T. Schwartz, Professor, UCLA School of Law, (Aug. 1, 1994) (confirming that Ford's analysis regarding lateral and side-impacts was set forth in an internal Ford memorandum).

415. MOKHIBER, *supra* note 403, at 375-76; Schwartz, *supra* note 403, at 1020.

U.S. manufacturers \$137.5 million.⁴¹⁶ Using a controversial NHTSA report that put a societal value on human life at \$200,000, Ford calculated that the new standard would force U.S. manufacturers to spend \$137.5 million in order to achieve a social benefit worth \$49.5 million.⁴¹⁷

Ford's efforts to relax safety regulation were not limited to filing formal petitions with NHTSA. We shall never know much about informal contacts between Ford and NHTSA personnel, nor shall we learn whether NHTSA received pressure from Capitol Hill. Due to an anomaly of history, however, we do know from the Watergate tapes that Henry Ford II and Lee Iacocca met Richard Nixon and John Ehrlichman in the Oval Office on April 27, 1971.⁴¹⁸ Henry Ford and Iacocca had come to persuade Nixon to help them with safety and environmental regulation generally, and one of their particular concerns was the Pinto. The price of the Pinto might skyrocket "something like fifty percent in the next three years," Henry Ford told Nixon.⁴¹⁹ Inflation was part of the problem, Ford said, "but that's not the big part of it. It's safety requirements, the emission requirements, the bumper requirements."⁴²⁰ People will buy foreign cars and "you're going to have balance-of-payments problems," Henry Ford warned Nixon.⁴²¹ Nixon, who knew the conversation was being recorded for posterity, expressly made no commitment, but he suggested that he was in strong agreement with his visitors and designated John Ehrlichman as Ford and Iacocca's future "contact person" in the White House.⁴²²

416. Ford's calculation, known as the Grush-Saunby Report, was submitted to NHTSA on September 19, 1973, as an attachment to its Petition for Reconsideration of Federal Motor Vehicle Safety Standard No. 301. Schwartz, *supra* note 403, at 1020 nn. 19, 21. See also CULLEN ET AL., *supra* note 403, at 162; MOKHIBER, *supra* note 403, at 376.

417. At Ford's urging to quantify safety benefits so proposed safety regulations could be subjected to a cost-benefit analysis, NHTSA accountants had previously valued the "societal cost" of human life at \$200,725. This was a sum of twelve components, including, *inter alia*, \$132,000 for direct productivity losses, \$41,300 for indirect productivity losses, \$4,700 for insurance administration, \$10,000 for victim's pain and suffering, and \$900 for a funeral. This, clearly, is a calculation only economists, accountants, and auto executives can appreciate. See LACEY, *supra* note 403, at 580-82; Schwartz, *supra* note 403, at 1020-26.

418. CULLEN ET AL., *supra* note 403, at 155.

419. CULLEN ET AL., *supra* note 403, at 157.

420. CULLEN ET AL., *supra* note 403, at 157.

421. "Right. I'm convinced," Nixon replied. CULLEN ET AL., *supra* note 403, at 157.

422. Nixon, for example, told Ford and Iacocca that environmentalists and consumer advocates "aren't really one damn bit interested in safety or clean air. They're enemies of the system. So what I'm trying to say is this: that you can speak

Had NHTSA learned of the special vulnerability of the Pinto gas tank, it might have taken prevented Ford from selling more than 1.5 million Pintos with an unprotected gas tank.⁴²³ While it is not clear how many people died as a result, NHTSA identified thirty-eight deaths resulting from Pinto fuel-tank fires but other estimates run between 500 and 900 fatalities.⁴²⁴ More than one hundred products liability lawsuits were filed, and eventually much of the Pinto information was unearthed through discovery.⁴²⁵ The best known of the Pinto lawsuits, *Grimshaw v. Ford Motor Co.*, resulted in a \$125 million punitive damage award against Ford (reduced to \$3.5 million by the trial judge).⁴²⁶ These actions—and the press reports that they stimulated⁴²⁷—precipitated NHTSA action. In May 1978, NHTSA issued a letter informing Ford that it had "initially determined that a defect which relates to motor vehicle safety exists in the 1971-1976 Ford Pintos" and that a public hearing would be held in June regarding the matter.⁴²⁸ Ford

to me in terms that I am for the system." CULLEN ET AL., *supra* note 403, at 156. Nixon promised "to see what the hell the Department [of Transportation] is doing in the future." *Id.* at 158. Nixon indicated tentative agreement with Ford and Iacocca that the federal government should not require air bags but added: "I may be wrong. I will not judge it until I hear the other side." *Id.* at 159.

423. With the exception of the standard applicable to trucks which it tabled indefinitely, NHTSA did not postpone its fuel integrity standards, which came into effect in 1977. CULLEN ET AL., *supra* note 403, at 160; Schwartz, *supra* note 403, at 1018-19, 1024. Had it known more, however, it may have advanced the effective date of the standards or taken other action.

424. Schwartz, *supra* note 403, at 1030 (reporting NHTSA figures); CULLEN ET AL., *supra* note 403, at 160-61 (reporting the 500-900 estimate). In his autobiography, Iacocca concedes that "raw gas spilled out and frequently ignited" and that Ford "resisted making any changes." He argues, however, that other American subcompacts were no more crashworthy. LEE IACOCCA, *IACOCCA: AN AUTOBIOGRAPHY* 161-62 (1984). This is true, but only because the other subcompacts had safety problems of their own. See Schwartz, *supra* note 403, at 1028-29.

425. A great deal was learned from deposition and trial testimony of Harley Copp, a senior Ford engineer who had been in charge of crash testing on the Pinto. See, e.g., *Grimshaw*, 174 Cal. Rptr. at 361; CULLEN ET AL. *supra* note 403, at 166, 275. See also PETER WYDEN, *THE UNKNOWN IACOCCA* 238 (1987) (stating that 117 lawsuits were filed concerning the Pinto and the essentially identical Mercury Bobcat).

426. 174 Cal. Rptr. 348 (Cal. Ct. App. 1981).

427. Two are particularly notable. On August 10, 1977, Ralph Nader and author Mark Dowie held a press conference announcing the publication of Dowie's article, *Pinto Madness*, in the September-October 1977 issue of *Mother Jones*. The press conference received wide publicity, and Dowie received the Pulitzer Prize for the article. On June 11, 1978, CBS News broadcast a segment about the Pinto entitled "Is Your Car Safe?" on *60 Minutes*.

428. CULLEN ET AL., *supra* note 403, at 165.

responded by voluntarily recalling all 1971-1976 Pintos to equip the gas tanks with polyethylene shields, longer filler pipes and seals.⁴²⁹

The Ford Pinto experience seems to have been repeated. From 1973 to 1987, General Motors Corporation produced millions of pick-up trucks with dual side-saddle fuel tanks mounted outside the truck frame.⁴³⁰ Nearly from the beginning, products liability suits alleged that the tanks were vulnerable to rupture or puncture and ignite in collisions from the side, but it was not until 1988 that GM stopped using side-saddle tanks and started selling new models with a single fuel tank located inside the frame.⁴³¹ By 1992, more than 300 people allegedly had burned to death as a result of side-saddle gas tanks, GM was defending more than one hundred lawsuits, and more than six million side-saddle trucks remained on the road, but GM preferred to settle and defend claims from future victims than to spend an estimated one billion dollars to recall the pickups.⁴³² In early 1993, at a products liability trial involving a teenage boy who burned to death in a GM pickup, two former GM engineers testified that as early as 1980 GM knew from its own crash tests that the side-saddle design was "indefensible."⁴³³ They testified, moreover, that GM lawyers had collected and shredded the damning documents.⁴³⁴ The jury handed down a \$105.2 million award, including \$101 million in punitive damages, which was later reversed on procedural grounds and remanded for a new trial.⁴³⁵

429. CULLEN ET AL., *supra* note 403, at 165. In September 1978, Ford Motor Company was indicted in Indiana for reckless homicide as a result of a Pinto accident the prior month in which three young women burned to death. It was acquitted in a controversial trial in which some believed the judge improperly aided the defense. Reginald Stuart, *Ford Auto Company Cleared in 3 Deaths*, N.Y. TIMES, March 14, 1980, at A1; Reginald Stuart, *Ford Pinto Trial Tries Prosecution's Patience*, N.Y. TIMES, Feb. 17, 1980, § 4 at 9; *Three Cheers in Dearborn*, TIME, March 24, 1980, at 24.

430. Barry Meier, *Data Show G.M. Knew for Years of Risk in Pickup Trucks' Design*, N.Y. TIMES, Nov. 17, 1992, at A1.

431. *Id.* (reporting change in 1988); Kenneth Jost, *GM Cover-up Charged in Truck Case*, 79 A.B.A. J., 22 (May 1993) (reporting that GM contended with product liability lawsuits for twenty years).

432. Meier, *Data Show G.M. Knew for Years of Risk in Pickup Trucks' Design*, *supra* note 430; Barry Meier, *G.M. Trucks Found to Be Fire Hazard*, N.Y. TIMES, Oct. 18, 1994, at A18.

433. Jost, *supra* note 431. See also Peter Applebome, *G.M. Held Liable Over Fuel Pickup Trucks*, N.Y. TIMES, Feb. 5, 1994, at A1.

434. Jost, *supra* note 431.

435. General Motors Corp. v. Moseley, 447 S.E.2d 302 (Ga. Ct. App. 1994).

In April 1994, NHTSA finally took its first action: it asked GM to voluntarily recall the trucks; GM refused.⁴³⁶ In October 1994, the Secretary of Transportation reported that a government investigation suggests that GM may have known about the danger of its pickups even before it sold the very first side-saddle truck in 1973.⁴³⁷ GM put sales ahead of safety, he said.⁴³⁸ In a settlement that some criticized as too lenient, the government discontinued its effort to compel GM to recall the trucks in return for GM's promise to spend \$51 million on safety and safety education.⁴³⁹ Nevertheless, the critical information was brought to light in products liability litigation.

The Pinto and GM pickup stories illustrate how difficult it is for regulatory agencies to police product safety. No factor is more important than information; Ford and GM possessed critical information that NHTSA did not have, namely, that the fuel tanks were especially vulnerable.⁴⁴⁰ The problem cannot be solved by requiring manufacturers to provide regulators with all information in their possession because manufacturers can elect not to conduct tests to determine whether in fact hazards that their engineers or chemists suspect actually exist. When that strategy is not possible, a manufacturer can take the opposite approach of turning over enormous volumes of data, effectively burying the needle in the haystack. Manufacturers may also relax regulatory action by a combination of private suasion and political pressure.

The products liability system compensates for the shortcomings of administrative regulation. It stimulates self-regulation, giving manufacturers a strong incentive to learn as much as possible about potential hazards and reduce risk. Manufacturers will always find ways to fool regulators. Common law liability is unique in that it encourages manufacturers not to fool themselves.

The common law system provides something else as well—something that is important yet counter-intuitive. The best way to describe this, perhaps, is to start with the concern that led Justice Stephen Breyer to write his most

436. Martin Tolchin, *GM Pickup Case Is Taken Over by the Secretary of Transportation*, N.Y. TIMES, Nov. 19, 1993, at A18.

437. Meier, *GM Trucks Found to Be Fire Hazard*, *supra* note 432.

438. Meier, *GM Trucks Found to Be Fire Hazard*, *supra* note 432.

439. Debra Saunders, *Decision Not to Recall GM Trucks Unprecedented*, ATLANTA J. & CONST., Dec. 19, 1994, at A/12.

440. Even today, NHTSA's base of information remains limited. NHTSA does not, for example, require manufacturers to report warranty claim data—i.e., the volume of repair requests that consumers are making under the manufacturers warranty program—which would alert NHTSA to safety problems. NHTSA principally relies on consumers to report such information directly to NHTSA. *Is the Car-Safety Agency Up to Speed?*, CONSUMER REP., Nov. 1993, at 734.

recent book, *Breaking the Vicious Circle*.⁴⁴¹ Breyer believes that agencies do a poor job of regulating risk. One of the main problems, he argues, is that agencies do not—and for systemic reasons cannot—rationally prioritize risks and set agendas.⁴⁴² EPA, for example, devotes far greater resources to cleaning up hazardous waste sites than to attacking the problems of acid rain, ozone depletion, or tap water contamination, even though scientists agree that these three other problems pose far greater threats to human health and the environment.⁴⁴³ Agendas are distorted, Breyer believes, because the agencies are controlled by Congress, which is slavishly sensitive to public opinion, and the public's perception of risks is distorted. Thus, policy results not from sound science but from erroneous public perception. EPA devotes inordinate resources to its hazardous waste program because, as opinion polls demonstrate, the public erroneously ranks hazardous waste as the single greatest environmental health risk.⁴⁴⁴

Breyer's assessment of the problems has merit, but his solution ignores an important dynamic. Breyer wants to establish a new agency, staffed with experts in health and environmental matters and charged with "building an improved, coherent risk-regulating system."⁴⁴⁵ He would provide this agency with unusual powers, including interagency jurisdiction and political insulation, and give it the authority to allocate the resources that society is willing to expend on risk reduction. In short, Breyer wants risk regulation controlled by centralized group of experts guided not by politics but by science and reason. What Breyer overlooks is that politics not only affects how knowledge is used, politics—in the broad sense of the term—affects how knowledge is acquired.

If Breyer's agency had operated in 1969, it might have reasoned as follows: NHTSA proposes fuel-integrity standards that will cost \$137.5

441. BREYER, *supra* note 398.

442. Breyer argues that the other major problems are: agencies pursue some goals too far (e.g., instead of devoting reasonable resources to remove 95% of the toxic materials from a hazardous waste site, EPA will expend enormous resources in a futile and unnecessary attempt to remove 100%); and agencies develop inconsistent programs and agendas (e.g., "[p]roposed rules concerning disposal of sewage sludge, designed to save one statistical life every five years, would encourage waste incineration likely to cause two statistical cancer deaths annually"). BREYER, *supra* note 398, at 11, 12.

443. BREYER, *supra* note 398, at 20.

444. BREYER, *supra* note 398, at 21. Breyer focuses on public opinion, but even more important, perhaps, is special interest alignment. Cohesive groups pressure Congress and EPA to clean up hazardous waste sites (i.e., people living near the sites) and powerful interests oppose regulations directed at acid rain or ozone depletion (i.e., smoke stack industries and CFC producers).

445. BREYER, *supra* note 398, at 59-61.

million and save 180 lives per year, a cost of \$763,888 per life. Meanwhile, EPA proposes rules relating to radon testing and abatement that will cost home buyers \$150 million per year and save 400 statistical lives, a cost of \$375,000 per statistical life.⁴⁴⁶ Society's risk reduction budget will accommodate only one of these programs.⁴⁴⁷ The choice is clear; the EPA program will save more lives and do so more cost efficiently. The problem with this analysis is that it is based on the best available—but faulty—information. NHTSA's data has been manipulated by Ford, which can in fact spend less money and save more lives.⁴⁴⁸ Had risk regulation been the exclusive province of regulatory agencies, and common law liability had not existed, the special risk of Pinto gas tank explosions may never have come to light.

The problem is even more acute when it involves chemicals (both pharmaceutical and toxic substances) where the association between exposure and disease is often obscured. The history of Bendectin, the prescription drug for treating nausea in pregnancy, illustrates the point.⁴⁴⁹ Bendectin was not tested for teratogenicity before being introduced. More than a decade later products liability lawsuits (eventually totalling more than 2,000) began to be filed alleging that Bendectin caused birth defects. There was much dispute about whether this was so. When in 1980 the FDA held a hearing on Bendectin, the scientific research was thin and the study results were mixed, and consequently FDA's conclusion was equivocal.⁴⁵⁰ There is a far greater body of information today—most of it developed as a direct result of litigation.⁴⁵¹ Bendectin was introduced in 1956 and withdrawn from the

446. These are a hypothetical set of facts.

447. This puts the rabbit in the hat, of course. When a new risk arises, society may—if it perceives the risk to be grave enough—decide to increase the total risk reduction budget.

448. The data is "faulty" and "manipulated" not because it is untrue—Ford's estimate of spending \$11 on a rollover valve to save 180 lives might have been literally correct—but in the sense that it is incomplete and misleading. Ford presumably did not tell NHTSA that, with the Pinto coming into production, overall fuel-integrity risks were greater than NHTSA anticipated; nor presumably did Ford disclose that its engineers developed an array of cost-effective solutions.

449. The following discussion about Bendectin is based on the excellent article by Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992).

450. FDA found that available data did not demonstrate an association between birth defects and Bendectin yet did furnish some evidence of association. It did not remove Bendectin from the market but recommended that Bendectin only be prescribed when conservative treatment failed. Sanders, *supra* note 449, at 318-19.

451. The prevailing view today is that the available data do not demonstrate an association between Bendectin and birth defects. Yet serious questions remain.

market in 1983, yet the vast bulk of research on the drug was done between 1981 and 1986.⁴⁵² "[T]he science was driven by the law," writes Joseph Sanders.⁴⁵³

Bendectin litigation is, not unique. It fits a pattern that Francis E. McGovern calls the "cyclical theory of mass torts."⁴⁵⁴ "In the early stages of the cycle," McGovern writes, "defendants tend to win more cases than plaintiffs because of strategic and informational superiority. If the litigation has any merit, however, plaintiffs will eventually develop successful information and strategies and win an extremely high percentage of the cases tried."⁴⁵⁵

The common law provides a mechanism for developing information—sometimes by prying it from the manufacturer's hands, sometimes by serving as a catalyst for creating new knowledge—and a forum for debating what the information means.⁴⁵⁶ The common law process, moreover, is painfully public, forcing manufacturers to calculate not only possible monetary consequences but to consider whether they would be prepared to have their actions revealed in the light of day.⁴⁵⁷ One can sympathize with Justice Breyer's craving for neatness, efficiency and consistency. However, in his desire "to limit the extent to which public debate about a particular substance determines the regulatory outcome,"⁴⁵⁸ Justice Breyer may be willing to give up too much.⁴⁵⁹

Reputable scientists are debating whether the majority view is due more to the convention of declaring an association to be "statistically significant" at an arbitrary point than to a scientific truth, and there is an important ongoing debate over how pronounced the statistical relationship should be before, for public policy purposes, an association should be deemed to have been established. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993); *Deluca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941 (3d Cir. 1990).

452. Sanders, *supra* note 449, at 331-48.

453. Sanders, *supra* note 449, at 346.

454. Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 482 (1986).

455. *Id.*

456. Again, Bendectin furnishes an example. See *supra* note 449.

457. Gary T. Schwartz has demonstrated that the Ford Pinto story has become a "myth" that is not historically accurate in all respects. See Schwartz, *supra* note 403. Yet legends and myths can be of great social value. There have been instances when executives and engineers considering safety shortcuts have remembered the Ford Pinto story and asked themselves whether they would be prepared to defend their choice in a court of law.

458. BREYER, *supra* note 398, at 78.

459. To be fair to Justice Breyer, it should be noted that his book does not argue against common law liability.

CONCLUSION

On July 27, 1994, Senator John C. Danforth (R-Mo) rose on the floor of the Senate in support of a bill called the Product Liability Fairness Act.⁴⁶⁰ To illustrate why tort reform legislation was needed to curb a products liability system that was dangerously out-of-control, Danforth told his colleagues a story:

There was a famous case a few years ago of a 70-year-old man who lost the eyesight in his left eye. Now, the loss of eyesight in one eye is not a minor matter. But what is the just result of a 70-year-old man losing eyesight in one eye? What is the reasonable compensation that such an individual should receive? Should it be in the thousands of dollars? In the tens of thousands. The hundreds of thousands? Should it be in the millions of dollars? This person filed a lawsuit, a products liability case, against Upjohn Co. and his recovery was \$127 million.⁴⁶¹

Anecdotes such as this have great persuasive power. Many of these stories, however, are grossly distorted—including this one.⁴⁶² In the case about which Danforth spoke, a jury did indeed render a verdict against Upjohn of more than \$127 million, but not because it deemed that to be "reasonable compensation" for the plaintiff's loss.⁴⁶³ More than \$124 million of the verdict represented punitive damages, designed to punish Upjohn for deliberately promoting the use of its drug, Depo-Medrol, in a manner that was not approved by FDA and without warning physicians about the risks of such use. Evidence showed that Upjohn had so effectively marketed Depo-Medrol for this unapproved purpose (injecting it near the eye to treat ocular disease) that ophthalmologists were using in this fashion one million times per year.⁴⁶⁴ Danforth also neglected to mention that trial court had reduced the punitive award to \$35 million and that an appeal seeking a further reduction was pending.⁴⁶⁵ As it happened, on the day following Danforth's remarks to the Senate, the appellate court handed down a long and carefully drawn decision reducing the punitive award to \$3,047,819, an amount equal to the

460. See *supra* note 26.

461. 140 CONG. REC. S7672 (daily ed. July 27, 1994) (statement of Senator Danforth).

462. For a description of other grossly distorted products liability stories, including several told repeatedly by Ronald Reagan, see Bogus, *supra* note 15, at 1160.

463. Proctor v. Davis, Nos. 1-92-3151, 1-92-3513 consolidated, 1994 Ill. App. Ct. LEXIS 995 (June 28, 1994).

464. *Id.* at *5.

465. *Id.* at *1.

compensatory award.⁴⁶⁶ The Products Liability Fairness Act was narrowly defeated,⁴⁶⁷ but tales like Danforth's live on, contributing to a mythology of a deranged judicial system.

Products liability and the common law now share a common fate. In this age of statutes and of administrative regulation, the common law has receded in importance. Products liability represents the most significant, if not only, area in which the common law has reestablished itself as a vital and dynamic force. It has become an essential participant in promoting public safety. This is not to deny that the primary role must be played by administrative agencies. We shall live forever more in technologically advancing society, and only a panoply of specialized bureaucracies can attempt to monitor the vast array of new products and services or provide a filtration system that prevents unreasonably dangerous products from entering the stream of commerce. Administrative agencies have their limits, however, and products liability is an essential auxiliary.

Products liability evolved from a system that dealt only with manufacturing defects into one concerned also with design defects because that is where it increasingly was needed. For the same reason, the natural course of evolution will take products liability into a third phase in which it deals forthrightly with generic risks. In a technologically advancing society, the ability to produce new products often outruns the capacity to make them safe. The problem cannot always be solved by warnings because purchasers are not the only ones at risk. There will be an ever-increasing number of nonmechanical products. Chemicals of all kinds will continue to grow in variety, complexity, and potency, and there will more biological, radiological, electromagnetic, and genetic products as well. These products migrate through the environment and put non-users at risk. Between 1971 and 1994, the cancer rate rose eighteen percent rise in the United States; and cancer is expected to surpass heart disease as the leading cause of death by the year 2000.⁴⁶⁸ It is almost inevitable that chemicals and other nonmechanical products will increasingly be implicated in cancer and other diseases.⁴⁶⁹ Yet chemicals and other nonmechanical products will often be considered exempt

466. *Id.*

467. *See supra* note 26.

468. Despite great advances in treatment, the rise in the cancer case rate has resulted, over the same period, in a seven percent rise in the cancer death, even with adjusting the death rate for the aging population. *See Boyd, supra* note 224.

469. While tobacco and diet are considered the primary causes of cancer, exposure to chemicals in the workplace, environmental pollution and radiation are recognized causes, *Boyd, supra* note 224, and may be the most likely causes of the rising cancer rate.

from strict liability if generic risks are excluded from products liability. This is why generic liability is so important to the future of products liability.

Products liability now stands at a crossroads. It cannot stand still; it will continue to evolve, progressively or regressively. In an age of statutes and regulatory bureaucracies, products liability is the one flower blooming in the garden of the common law. Either it will continue to thrive—and demonstrate that the common law has a role in modern society—or it will wither, and the garden once lovingly tended by Holmes and Cardozo will be bare.